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QUALIFIED RIGHTS OF ADDRESSEE IN LETTERS AS LITERARY PROPERTY.

In King et al. v. King, 168 Pac. 730, decided by Wyoming Supreme Court, the question was of the right of sender and addressee to restrain, by injunction, the publication of letters, which defendant clandestinely had obtained and used in a divorce suit.

In this case it appears that personal and private letters had been written by one of the plaintiffs to the other and defendant had used them as evidence in her divorce suit against such other plaintiff and at the conclusion of the case by agreement they were sealed up and placed in the custody of the clerk of the court. Afterwards defendant in the proceeding at bar by her application to the court sought an order for the unsealing of said letters so as to use them in a proceeding before a lodge of a secret order. Temporary injunction was denied against granting of the order and this ruling was reversed by the Supreme Court of Wyoming.

In an early opinion by Judge Story it was ruled that the author of letters written and sent to another had exclusive copyright therein and could prevent publication thereof by addressee for his own benefit. It was said: "In short, the person to whom letters are addressed has but a limited right in special property (if I may so call it) in such letters, as a trustee or bailee, for particular purposes, either of information or of protection, or of support of his own rights and character."

This theory often has been ruled in later cases, a notable case on this line being

that of Baker v. Libbie, 210 Mass. 599, 37 L. R. A. (N. S.) 944, in which the question of the publication of the private letters of Mrs. Eddy, the founder of Christian Science, was involved.

It was claimed that the use intended to be made of the letters came under a recognized exception justifying the use of the letters and was for the purpose of public justice. But the court said: "By no conception can it be claimed that the tribunals or rules adopted within the precincts of a secret organization could be considered for the purposes of public justice publicly administered according to the established institutions of the country."

While this view is sound, yet we greatly doubt that the exception would cover a case of a party seeking to use in a suit for vindication of his private rights in a court of justice such letters.

It might be that in a criminal prosecution they might be available as evidence. But where a civil action is tried, public justice should not override a third party's vested rights in seeking one's own rights.

The exception above stated admittedly is limited to cases where letters do not tend to criminate any person required by law to produce them for use as evidence. But this is on the theory that outside rights are in no wise to be jeopardized by one using judicial tribunal to secure justice for himself. His claim for this is a private or personal matter. It is not a matter of public justice that it be granted to him. It is matter of public justice only as the setting of a precedent in law, that procedure therefore be in due and regular course. Above all things a court of justice goes upon the principle that no vested right shall be taken away from another without his having his day in court. And it is said in the case considered that a sender of a letter does not relinquish his property therein. He only makes the addressee a bailee for a particular purpose.

NOTES OF IMPORTANT DECISIONS.

INDEMNITY INSURANCE — INTEREST AND COSTS IN APPEAL ADDED TO MAXIMUM INDEMNITY.—Ravenswood Hospital v. Maryland Casualty Co., 117 N. E. 485, decided by Supreme Court of Illinois, was a suit by an indemnitee to recover from indemnitor a sum exceeding the limit expressed in the policy, where the judgment was in excess of that limit and also the costs paid in taking an appeal and interest accumulated while it was pending.

In this case the defense had been taken in charge by indemnitor and after verdict, it insisted upon appeal being taken. Recovery was denied as to the excess as such, but was allowed as to the costs on appeal and the interest accruing until the case was affirmed by the Supreme Court.

As to the claim for the excess in recovery above the amount expressed in the policy, the policy is referred to as conclusive on this question. As to the other contention it was said: "In this case the obligation of appellant was to indemnify appellee against loss from liability imposed by law for damages on account of injury or death sustained by a patient," etc. Appellant further agreed that it would "at its own cost defend such suit" unless it should elect to pay appellee the amount of the policy. "What was meant by the phrase, 'at its own cost defend such suit?' Clearly that appellant would bear all the expenses incident to the defense of such action, no matter what their kind or nature. This was to be in addition to the \$5,000 specified in the policy. * * * The perfecting of the appeal did not relieve appellee of liability for the loss as ascertained and fixed by the judgment, but only suspended its collection until such further time as the judgment of the lower court could be reviewed on the appeal. Pending the appeal and by reason thereof, costs and interest accrued. * * * Had appellant chosen to pay appellee the amount of its policy of \$5,000, when that judgment was rendered, it would thereby have relieved itself from the expense incident to the appeal, and the appellee would have had the privilege of either using said amount to satisfy the judgment or in prosecuting its appeal. In either event, appellant would not have been liable for the interest on the \$5,000 judgment pending the appeal. * * * But appellant did not choose to do this, but on the contrary insisted on the case being appealed to the Appellate Court. Under the terms of the policy, appellee was compelled to participate in the

appeal or forfeit its rights under the policy." It is then stated that: "Interest on a judgment is as much an incident to expense in carrying a case to the Appellate Court as are the court costs."

The judgment affirmed shows that, not the interest on the entire judgment was allowed in favor of indemnitee, but only on the amount of \$5,000. But it seems a little difficult to distinguish in this way. The compulsion on the indemnitee was to carry the judgment that had been rendered to the Appellate Court for review. If compulsion is to measure obligation of indemnitor, the judgment is not divisible in indemnitor's favor. Indemnitee could not settle partially with the plaintiff, in whose favor the judgment had been rendered. At all events, however, the ruling is quite salutary on the question of interest accruing on appeal. Possibly, the principle ought to be extended in the obtaining a new trial at indemnitor's demand, and a second trial resulting in an increased recovery.

BILLS AND NOTES—NOTE PAYABLE TO MAKER'S OWN ORDER AND NOT INDORSED.—In Moore v. Cary, 197 S. W. 1093, decided by Tennessee Supreme Court, a promissory note was signed by two parties as makers and made payable to the order of one of them. The names of the signers were Moore and Cary, and it was claimed that as the same person cannot be both maker and payee, the name of Moore must be treated as a nullity, the note being sued on by alleged holder, with no indorsement of Moore thereon.

The court said: "It is true that the same person cannot be both maker and payee, nothing else appearing. However, as pointed out by Mr. Daniel in his valuable work on Negotiable Instruments, the execution of such instruments is very common in England and in this country, the paper being ineffective until indorsed, but on being indorsed becoming a note payable to bearer. The learned writer says: 'They are designed to enable the holder to use them without indorsement, and are simply roundabout notes payable to bearer.' The same principle is recognized in the Negotiable Instruments Law, § 8, wherein it is provided that such an instrument may be drawn payable to the order of the drawer or maker. But in the same law it is provided that such a paper is not complete until it is indorsed by the payee. There is, however, nothing written on the back of any of the papers which Moore appears to have signed, and those must be treated as incomplete in which his name appears as payee and apparently as maker also.

unless it can be determined, that Moore wrote his name on the face, intending thereby to become an indorser. * * * Now, we must suppose that E. H. Moore placed his name upon the papers mentioned with the purpose of being bound. The only way he could be bound under the facts stated, was as indorser, and we must conclude that he intended to so bind himself."

The court referred to rulings to the effect, that on the back of the paper an indorser's name generally appeared. Daniel says it is unusual and irregular for it to appear elsewhere, but Lord Campbell said it "was quite immaterial whether this was on the back or on the face of the instrument."

Of course, if indorsement does appear on face, it is not only unusual, but where the position of the name is such that the instrument appears no instrument at all, unless it is counted as that of maker, the court could not say that at inception, at least, he could not be bound except as indorser. In this case there were two apparently signing as makers and this fact gives some basis for the court saying that only the other might be held as maker, and Moore only as indorser.

EMPLOYES ENGAGED IN INTER-STATE COMMERCE AS DECLARED BY THE UNITED STATES SUPREME COURT.

Introductory.—Numerous cases arising under the Federal Employers' Liability Act present a very close question as to whether or not the plaintiff employe was engaged in interstate commerce at the time he suffered injury. As this question is primarily one of fact, each case must be decided in the light of the particular facts.

In cases in which there is room for doubt, the test is, was the act of the employe so directly and immediately connected with the business of interstate commerce as substantially to form a part or a necessary incident thereof?¹

Or, as stated by the Court, in cases decided by it, "Was the employe, at the time

(1) New York Cent. & H. R. R. Co. v. Carr, 238 U. S. 260, 9 N. C. C. A. 1, aff'g 158 App. Div. (N. Y.) 891.

of the injury, engaged in interstate transportation or in work so closely related to it as to be practically part of it?"²

Most railroad tracks are used in both interstate and intrastate commerce, but when so used they are none the less instrumentalities of the former. Nor does such double use prevent the employment of those who are engaged in keeping such tracks in suitable condition for use from being an employment in interstate commerce.³

Decisions of the United States Supreme Court, and especially recent decisions of that Court, tend greatly to clarify the vexing question of employment in interstate commerce. We learn from them that the solution of the question depends upon the circumstances at the very time in question, not upon those theretofore existing, except in so far as what has gone before sheds light upon the status of affairs at that time, nor upon contingencies of the future. In this respect, however, there is a marked difference between depending upon mere expectation or the contingency that acts will follow which will serve to fix the character of acts presently done, and doing an act for the purpose of furthering a movement which will be in interstate commerce. In the latter event the whole course of conduct is in interstate commerce.

We learn, too, the distinction between work of repair on an instrumentality which has been entirely withdrawn from all commerce for the purpose of being repaired, and work on one which has momentarily been halted in its course to receive needed repairs, after which it continues on its journey, the character of which is not altered by the slight interruption.

(2) Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 558, 60 L. ed. 436; New York Cent. R. Co. v. White, 243 U. S. 188, 37 Sup. Ct. 247, 13 N. C. C. A. 943.

(3) Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 3 N. C. C. A. 779, 57 L. ed. 1125, Ann. Cas. 1914C 153, rev'd 197 Fed. 537, 117 C. C. A. 33.

Some of these decisions overrule many decisions of the state courts, and are thereby rendered doubly important.

Repairing Engine Temporarily Withdrawn from Service.—A distinction is drawn between work on an engine which has been temporarily withdrawn from service, and one which is stopped temporarily in interstate commerce to receive repairs, after which it continues on its way. So, too, a difference is noted between the status of the engine first mentioned and a roadbed which is permanently devoted to interstate traffic, although it may also be engaged in carrying intrastate traffic.

The plaintiff was injured while engaged in repairing an engine. The engine "had been used in the hauling of freight trains over defendant's line, which freight trains hauled both intrastate and interstate commerce, and it was so used after the plaintiff's injury." Three days before the accident the engine was used to pull a train, and it was likewise used on the day of the accident, after the happening thereof. It was held that the plaintiff was not engaged in interstate commerce.

In this case the Court said: "This is not like the matter of repairs upon a road permanently devoted to commerce among the states. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events."⁴

(4) *Minneapolis & St. L. R. Co. v. Winters*, 242 U. S. 353, 13 N. C. C. A. 1127.

Car Stopped Temporarily for Repairs.—

A car containing an interstate shipment, stopped for repairs before it reaches its destination, its cargo not being ready to deliver to the consignees, is held to be still engaged in interstate commerce. "The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination and was not then ready for the delivery to the consignee, wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and was being hauled upon its tracks when the accident occurred."⁵

Switching Intrastate Car from Train Carrying Interstate Freight.—Plaintiff, a brakeman, was injured while setting out an intrastate car from a train which also carried interstate goods; the car being still attached to the engine when the injury occurred. Held, that he was engaged in interstate commerce. In part, the Court said:

"The plaintiff was a brakeman on an interstate train. As such, it was a part of his duty to assist in the switching, backing and uncoupling of the two cars so that they might be left on a siding in order that the interstate train might proceed on its journey. In performing this duty it was necessary to set the brake of the car still attached to the interstate engine, so that, when uncoupled, the latter might return to the interstate trains and proceed with it, with plaintiff and the other interstate employees, on its interstate journey."⁶

Switching Interstate Car in Breaking Up Train in Yards.—The plaintiff was a switch foreman and was breaking up a train that had come into his state from another state. At the moment when he was hurt he had

(5) *Delk v. St. Louis & S. F. R. Co.*, 220 U. S. 580.

(6) *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260, 9 N. C. C. A. 1, aff'd 158 App. Div. (N. Y.) 891.

three cars attached to the engine; the rear one consigned to Duluth, and to be switched to another track; the next consigned to Minneapolis; both loaded. The coupler on the Minneapolis car was out of order, and there was evidence that it had been marked for repairs and was to be switched to the repair track before going farther. Plaintiff was injured while uncoupling the cars, the injury being due to the defective coupler. The defendant argued that the car had been withdrawn from interstate commerce; that the Safety Appliance Act required it to remove the car for repairs, and that its effort to comply with the statute could not constitute a tort; and that the plaintiff was the person entrusted by it with the details of the removal and could not make it responsible for the mode in which his duty was carried out. It appeared, however, that the car, without being unloaded, was carried to Minneapolis the next day. It was held that the plaintiff was engaged in interstate commerce at the time of his injury, and entitled to recover under the Employers' Liability Act. Speaking of the car in question, the Court, in part, said:

"It had not been withdrawn from interstate commerce, but merely subjected to a delay in carrying it to its destination. At the moment of the accident it was accessory to switching the Duluth car. It does not seem to us to need extended argument to show that the car still was subject to the Act of Congress."⁸

Switching Interstate Cars in Yard Before Reaching Destination.—The plaintiff was employed as a switchman in the defendant's yards. Two loaded coal cars coming from without the state were received in the yards. They were destined to a private track connecting with the yards, and acting under instructions plaintiff commenced the switching movement requisite to place them on such track. There was evidence tending to show that in order to complete this movement it became necessary to uncouple

the engine from the loaded cars and with it to remove two empty ones from the private track. While engaged in removing the empty cars, plaintiff was injured. It was held that the trial court properly submitted to the jury the question whether or not the plaintiff was engaged in interstate commerce, and a finding in the affirmative was sustained.⁹

Moving Intrastate Cars from Point to Point in Same City.—One employed on a switch engine in moving a number of cars, all loaded with intrastate freight, from one point in a city to another point in the same city, is not engaged in interstate commerce.

"That he was expected, upon the completion of that task, to engage in another which would have been a part of interstate commerce is immaterial under the statute, for by its terms the true test is the nature of the work being done at the time of the injury."⁹

On Way to Boarding House After Preparing Engine to Haul Empty Cars.—Deceased, a locomotive fireman, after inspecting, oiling, firing, and preparing his engine for starting on a trip to another state, but before the engine had been attached to any of the cars of the train, attempted to cross certain tracks which intervened between the engine and his boarding-house, and was struck and killed by an engine running on one of said tracks. There was some contention that the cars making up the train to be hauled were empty; this because their contents were not proved. It was held that deceased was employed in interstate commerce at the time he was struck and killed. The court held that the hauling of empty cars from one state to another is interstate commerce. On the question whether deceased was still engaged in interstate commerce while going to his boarding-house, the Court said:

(8) Pennsylvania Co. v. Donant, 239 U. S. 50, aff'g 224 Fed. 1021.

(9) Illinois Cent. R. Co. v. Behrens, 233 U. S. 473.

(7) Great Northern R. Co. v. Otos, 239 U. S. 349.

"Assuming (what is not clear) that the evidence fairly tended to indicate the boarding-house as his destination, it nevertheless also appears that deceased was shortly to depart upon his run, having just prepared his engine for the purpose, and that he had gone beyond the limits of the railroad yard when he was struck. There is nothing to indicate that this brief visit to the boarding-house was at all out of the ordinary, or was inconsistent with his duty to his employer. It seems to us clear that the man was still 'on duty,' and employed in commerce, notwithstanding his temporary absence from the engine."¹⁰

Engineer on Way to Inspect Engine Before Making Run.—The deceased, engineer of an interstate train, finished one-way of his run, left his engine in the yard near the roundhouse, was detained in the yards for a time, went to the boarding house patronized by the railroad men, found it full, and went back to the roundhouse, into an engine, and went to sleep. He was due to take his regular run at 6:10 the following morning. About 4:30 the next morning the engine in which he was sleeping was run out of the roundhouse, down to a coal chute, to be supplied with coal, water, etc., for its trip. Deceased waked at the chute, got off the engine, inquired where his engine was to be found, was informed as to its location, and then started in that direction.

That was the last seen of him alive. Later he was found in an open, uncovered pit in the roundhouse, dead. His engine had been standing with the step over the pit, which was over eight feet deep, and was unlighted. It was held by the State Court that deceased was engaged in interstate commerce at the time he met his death, and this decision was affirmed by the United States Supreme Court.

In its opinion, the State Supreme Court said: "The exact question is: For what

purpose did Padgett (deceased) go into the roundhouse? If he went there for any purpose of his own, or there is an utter failure of evidence to prove any circumstance from which his purpose can be inferred, then the verdict ought to have been directed. There was evidence to show that, when the engine came into the yard that night, it had a hot box and needed repairs; that the rule required the engineer to inspect his engine only about an half hour before the leaving time. There was no intimation that he was forbidden to inspect it before. There was evidence that, if the inspection was made at the required hour and it was found that the repairs had not been made or improperly made, then the engine would have to be returned to the roundhouse to have the repairs properly made; that the repairs would take time, and the time necessary would have to be taken even if it delayed the departure of his train. The evidence is circumstantial, but conclusions may be drawn from circumstances. * * * Of course, he had a right, under the rules to loaf around until the exact minute that the rule required him to take his engine, and if error had occurred in the mechanical department, he had the right to send the engine back and delay the train. Would a faithful servant be likely to do that? That was a question for the jury. Would a man recently promoted stand upon the strict letter of the rule?"¹¹

Mining Coal to be Used in Interstate Commerce.—The fact that the coal which an employe is engaged in mining is to be used in interstate commerce after being transported does not make his employment one in such commerce. "The injury happening when plaintiff was preparing to mine the coal was not an injury happening in interstate commerce, and the defendant was not then carrying on interstate commerce,

(10) North Carolina R. Co. v. Zachary, 232 U. S. 248, 9 N. C. C. A. 109, Ann. Cas. 1914C 159, rev'd 156 N. C. 496.

(11) Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, aff'd S. C., 83 S. E. 633.

facts essential to recovery under the Employers' Liability Act."¹²

Wheeling Coal to Heat Shop Where Interstate Cars Are Repaired.—An employe of the defendant was injured while wheeling coal to heat the shop in which other employes were engaged in repairing cars that had been and were to be used in interstate commerce. It was held by the State Court that the employe was employed in interstate commerce. In part, the State Court said: "That the men engaged in repairing the cars were employed in interstate commerce is well settled. That an employe carrying materials to the shop to be used in repairing the cars would be employed in interstate commerce the Pedersen case decides. It seems no extension of the construction thus given to the statute to hold that an employe carrying coal for use in heating the shop where the repairs were made is employed in interstate commerce. The repairs could not be made unless the shop was heated. It is not material what our own views are on the proper construction of the federal statute. We are bound by the decisions of the Supreme Court of the United States."

The last mentioned Court, however, reversed the state Court, holding that the employe was not engaged in interstate commerce.¹³

Switching Coal to be Used in Interstate Engines.—At the time of the death of deceased, he was engaged in switching coal, belonging to defendant, from a storage track to a coal shed, where it was to be placed in bins or chutes and supplied, as needed, to locomotives engaged indiscriminately in intrastate and interstate commerce. Held, that he was not engaged in interstate commerce. "It is not important whether he had previously been engaged in interstate commerce, or that it was con-

(12) *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397.

(13) *Illinois Cent. R. Co. v. Cousins*, 241 U. S. 641, 60 L. ed. 1216, rev'd 126 Minn. 172, 6 N. C. C. A. 182.

templated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of the coal from the storage tracks to the coal shed, or chutes. This was nothing more than the putting of the coal supply in a convenient place from which it could be taken as required for use."¹⁴

Guarding Material to be Used in Construction of Interstate Road.—One employed by a railroad company as night watchman to guard tools and material intended to be used in the construction of a new station and new tracks forming an interstate railroad, was not engaged in interstate commerce. "Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work."¹⁵

Carrying Bolts to Repair Bridge.—The plaintiff and another employe, acting under a foreman, were carrying from a tool car to a bridge some bolts, which were to be used by them that night or very early the next morning in repairing the bridge. The bridge could be reached only by passing over an intervening temporary bridge. Both bridges were being regularly used in both intrastate and interstate commerce. While plaintiff was carrying a sack of bolts over the temporary bridge, on his way to the bridge which was to be repaired, he was run down and injured by an intrastate train. Held, that the plaintiff was injured while engaged in interstate commerce, and, hence, that he was entitled to the protection of the Federal Employers' Liability Act.

The following portion of the Court's opinion in this case is of great value: "Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected

(14) *Chicago, B. & Q. R. Co. v. Harrington*, 241 U. S. 177, 60 L. ed. 941, 11 N. C. C. A. 992, aff'd Mo. App., 180 S. W. 443.

(15) *New York Cent. R. Co. v. White*, 243 U. S. 188, 37 Sup. Ct. 247, 13 N. C. C. A. 943, aff'd 216 N. Y. 563.

therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct any defect or insufficiency in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharfs, or other equipment used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test is: Is the work in question a part of the interstate commerce in which the carrier is engaged? Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

The Court further held that it was of no consequence that the men had not commenced the actual work of repair, but were only making things ready for such work. "It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of

that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."¹⁶

Altering Machinery in Repair Shop.—

An employe of a railroad company, which was engaged in both interstate and intrastate transportation, was injured while engaged in the work of taking down and putting into a new location an overhead counter-shaft, through which power was communicated to some of the machinery used in repair work. It was held that such employe was not engaged in interstate commerce.

Said the Court in this case: "Coming now to apply the test to the case in hand, it is plain that Shanks was not employed in interstate transportation, or in repairing or keeping in usable condition a roadbed, bridge, engine, car or other instrument then in use in such transportation. What he was doing was altering the location of a fixture in a machine shop. The connection between the fixture and interstate transportation was remote at best, for the only function of the fixture was to communicate power to machinery used in repairing parts of engines some of which were used in such transportation. This, we think, demonstrates that the work in which Shanks was engaged was too remote from interstate transportation to be practically a part of it."¹⁷

Painting Engines and Cars.—The plaintiff was employed by defendant, and at the time of his injury was spraying paint on engines and cars by means of a "paint gun."

The machine in question was operated by means of air pressure, which caused the air about the operator to become heavily

(16) *Pedersen v. Delaware, L. & W. R. Co.*, 229 U. S. 146, 3 N. C. C. A. 779, 57 L. ed. 1125. *Ann. Cas.* 1914C 153, rev'd 197 Fed. 537, 117 C. C. A. 33.

(17) *Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. ed. 436, L. R. A. 1916C 797, aff'd 214 N. Y. 413.

laden with paint, in the form of mist. It was breathing this paint-laden air that caused the injury complained of. The Court of Appeals of Maryland held that, as the engines and cars were used in interstate commerce, and as it was the duty of the defendant to keep them in safe condition and proper repair, the plaintiff's work had a reasonable and substantial relation to interstate commerce, in which commerce, it therefore concluded, he was engaged at the time of receiving his injury. This decision was reversed by the United States Supreme Court on authority of Delaware, L. & W. R. Co. v. Yurkonis, Shanks v. Delaware, L. & W. R. Co., etc., all of which cases are treated in this article.¹⁸

Constructing Tunnel.—One engaged in the construction of a tunnel, which, when completed, was intended to be used by the employer to shorten its line of railroad over which it transported both intrastate and interstate commerce, was not engaged in interstate commerce. In distinguishing this case from the Pederson case, the Circuit Court of Appeals said: "We think there is a clear distinction between the facts in that case and those in the case at bar. The plaintiff in error here was engaged in constructing a new instrumentality. When completed it was intended to be used in interstate commerce, but as yet it was no part of the railroad line of the defendant in error, and it had not become an instrumentality in interstate commerce."

The Court mentioned the similarity of this case and that of Bravis v. Chicago, M. & St. P. R. Co. (a Circuit Court of Appeals case reported in 217 Fed. 234, 133 C. C. A. 228), in which it appeared that the employee in question was engaged in the construction of a bridge 600 feet distant from the railroad on a cut-off more than a mile in length, and which had never been provided with rails or used as a railroad; it being the intention to use the bridge for the transportation of inter-

state commerce when the cut-off was finished. In that case the Court declared that the mere fact that it was the purpose and intention so to use it at some future time did not make it an instrumentality of interstate commerce.¹⁹

Taking Numbers of and Sealing Cars.—

One employed as a yard clerk, and whose duties were to examine incoming and outgoing trains and make a record of the numbers and initials on the cars, to inspect and make a record of the seals on the car doors, to check the cars with the conductor's lists, and put cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing, trains, some of the cars being intrastate and some interstate, was engaged directly in interstate commerce while on his way to meet an incoming train containing interstate freight. "The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going farther or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."²⁰

Dining Car Waiting on Siding for Train.—

A dining car regularly employed in interstate commerce between San Francisco and Ogden was attached to an eastbound train, which was so late that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory to be picked up by that train when it came along that evening. The car contained no passengers, but was stocked for the return. It was held that the car was

(18) Baltimore & O. R. Co. v. Branson, 242 U. S. 623, rev'd 128 Md. 678.

(19) Raymond v. Chicago, M. & St. P. R. Co., 243 U. S. —, 61 L. ed. —, aff'd 233 Fed. 239, 147 C. C. A. 245.

(20) St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'd Tex. Civ. App., 148 S. W. 1099, 3 N. C. C. A. 800.

in interstate commerce while waiting to be picked up by the westbound train. In referring to certain cases cited by the defendant, the Court said: "The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different states, renders this and like cases inapplicable. Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train."²¹

Transporting Logs to Place of Shipment.—One employed on a logging railroad, the owner of which carries its own logs in its own cars from its own timber land in the state to a tidewater point, also within the state, where the logs were dumped into the water, some of them going beyond the state, was not engaged in interstate commerce. Quoting from other cases, the Court said:

"When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state."

"But this movement (interstate movement) does not begin until the articles have shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey. Until actually launched on its way to another state, or committed to a

(21) Johnson v. Southern Pacific Co., 196 U. S. 1, 59 L. ed. 363.

common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state."²²

Moving New Outhouse to Take Place of Old.—A crew transporting a new outhouse to a depot already in use on an interstate railroad, for the purpose of installing it to take the place of an old one previously erected at such depot, was held by the Supreme Court of Minnesota to be engaged in interstate commerce. Said the State Court: "The old outhouse, for which the one in question was to be substituted, was a mere appendage to defendant's station building or depot. This depot was used in interstate commerce; and replacing the old closet by a new one was rather in the nature of repairs to the station accommodations provided for the use of the traveling public, than the installation and erection of a new and independent structure." However, this decision was reversed by the United States Supreme Court on authority of Delaware, L. & W. R. Co. v. Yurkonis, and other cases contained in this article.²³

Yard Conductor on Way to Receive Orders.—One employed as yard conductor by an interstate railroad, having executed all of his orders, rode on a freight engine on his way to report to the yardmaster for further orders, and who was injured in alighting from the engine, was not injured while engaged in interstate commerce, regardless of the nature of the work the orders he would have received would have required of him.²⁴

Clearing Track of Wreckage.—An employe who was injured while clearing up a

(22) McCluskey v. Marysville & N. R. Co., 37 Sup. Ct. 374, quoting from Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715, and The Daniel Ball, 10 Wall. 557, 19 L. ed. 999. Another case involving the same question and decided accordingly is, Bay v. Merrill & Ring Logging Co., 37 Sup. Ct. 376.

(23) Minneapolis & St. L. R. Co. v. Nash, 242 U. S. 619, 61 L. ed. —, rev'd 131 Minn. 166, 154 N. W. 957.

(24) Erie R. Co. v. Welsh, 37 Sup. Ct. 116.

wreck which blocked the movement of interstate trains, was employed in interstate commerce.²⁵

C. P. BERRY.

St. Louis, Mo.

(25) Southern R. Co. v. Puckett, 37 Sup. Ct. 703.

STATUTE OF FRAUDS—PROMISE VALID WHERE MADE.

BARBOUR v. CAMPBELL.

Supreme Court of Kansas. Nov. 10, 1917

168 Pac. 879.

(Syllabus by the Court.)

The statute of frauds declares the public policy of this state to be that, unless a promise of one person to pay the debt of another is in writing and signed by the promisor, an action on that promise cannot be maintained in a Kansas court, although the contract may be valid in the state where it was executed.

DAWSON, J. The principal question presented in this appeal is controlled by the statute of frauds. The plaintiff is the divorced wife of the late Webster S. Barbour of Boise, Idaho. The defendant is his daughter. The plaintiff sued the defendant in the district court of Wyandotte county, Kan., upon an oral promise of the defendant to pay the plaintiff for services rendered by her to defendant's father during his last sickness. Plaintiff's deposition recites the facts relied upon to establish her cause of action:

"Mr. Barbour was very bad, and I did not feel like leaving him, so while my sister was there he called Mrs. Campbell to his bedside and said to her, 'Maude, I have agreed to pay Willie \$500 for nursing and caring for me and for her expenses, and I want you in case I die to pay her this amount, saying if you will pay her that it will avoid my doing so and I will leave my estate to Lou and you.' She said, 'You can depend on me, father; I will pay her.' He again said, 'Now Maude, you will do this, won't you?' and she said, 'Yes, father, I will.' And he said, 'You know she has been kind, taking good care of me and done things for me that no one else would or could do' and she said, 'Yes, I know she has, and if the amount had been a thousand dollars I would pay her willingly.'"

(1.) The defendant prevailed below, and the plaintiff assigns and argues many errors,

but a consideration of our statute for the prevention of frauds and perjuries may solve the whole problem. Section 6, in part, reads:

"No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person; * * * unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing." Gen. Stat. 1915, § 4889.

Observe the language of the statute. It says no such action shall be brought. It does not say such a promise is illegal. It does not declare such a contract void. It merely withholds a remedy. It declares that the courts of this state may not be used to enforce such promises or such contracts. The title of the act declares its purpose, "An act for the prevention of frauds and perjuries." The act proceeds on the theory that to countenance such an action would open the door to all manner of frauds and encourage the boldest sort of perjury. The act announces the public policy of this state. Every lawyer, every judge, every critical observer, knows that the greatest blight on the administration of justice is the persistent and ever-recurring perpetration of perjury, and a statute plainly designed to limit opportunities for perjury must not be frittered away with specious refinements and exceptions.

(2.) Plaintiff pleaded the Idaho statute of frauds, and offered proof that the defendant's oral promise to pay her father's debt did not fall within the ban of the Idaho statute, and that it would be enforceable in that state. Ordinarily a contract which is valid where made is valid everywhere, but there is a well-known exception to that rule. Briefly stated, the exception is that, where the contract contravenes the settled public policy of the state whose tribunal is invoked to enforce the contract an action on that contract will not be entertained. Third National Bank of New York v. Steel, 129 Mich. 434, 88 N. W. 1056, 64 L. R. A. 119; Heaton v. Eldridge & Higgins, 56 Ohio St. 87, 46 N. E. 638, 36 L. R. A. 817, 60 Am. St. Rep. 737; Conley's Constitutional Limitations (7th Ed.) p. 178; 9 Cyc. 674-677; 5 R. C. L. 917, 918, 944, 945.

In Wharton on the Conflict of Laws, vol. 2 (3rd Ed.) 1442, it is said:

"Statutes directing that no suit shall be sustained, in certain classes of cases, except on written testimony, are based on moral grounds. Their object, as is shown by the title of that

which served as the pattern of all others, is to prevent fraud and perjury. Here, then, comes into play the position on which Savigny lays such great stress—that moral laws, or laws to effect moral ends, which are imposed by particular states, are peremptory and coercive, and are to be taken as rules of procedure by the judges of such states. It is true that Judge Story opposes to such a conclusion his great authority. He maintains that where parol contracts are good by the law of the place where they are made, they may be enforced in countries where they would, if there executed, be barred by the statute of frauds; and he cites a number of cases to this point, 'none of which,' his editor, Judge Redfield, states, 'seem to adopt the views he here intimates.' But it may now be regarded as settled that where the statute of frauds provides, in a particular state, that no suit shall be maintained on a particular contract unless it be in writing, the *lex fori*, in such case, is absolute, and applies to a foreign contract good by the law of the place of its solemnization."

This view renders it unnecessary to consider the other errors assigned. The judgment is affirmed. All the Justices concurring.

NOTE.—Enforceability in Another State of Contract There Within Statute of Frauds.—The instant case held that as the Kansas statute forbids its courts to enforce such a contract as was there involved, the public policy of Kansas as declared by its statute forbidding enforcement by its courts. It is not said, that enforceability is a question of *lex fori*—that is to say law of remedy. By the instant case it is merely ruled that comity cannot be invoked. This is equivalent to saying that the court did not think that the *lex loci* would have denied plaintiff his remedy.

In Callaway v. Prettyman, 218 Pa. 293, 67 Atl. 418, the contract sued on was in regard to land in New Jersey. It was invalid so far as the law of that state was concerned. But by Pennsylvania statute it was a valid contract. It was held plaintiff had a right of action though the contract concerned the sale of land in the former state, the *lex loci contractus*, and not the *lex rei sitae*, controlling. But the statute of New Jersey only incidentally referred to the land. It provided that brokers' contracts regarding land should not be valid unless they were licensed. To the same effect is Hatton v. Morton, 13 Ga. App. 469, 79 S. E. 371; Exchange Bank v. McMillan, 76 S. C. 561, 57 S. E. 630, and Howell v. North, 93 Neb. 405, 140 N. W. 779.

In Murdock v. Calgary Col. Co., 193 Ill. App. 295, there was suit on a contract for payments on a sale of land in Canada. There the suit was not maintainable under rule under Statute of Frauds. But it was contended that this merely affected the remedy and the *lex fori* applied. But the court said: "The clear weight of authority is to the effect that Statute of Frauds affects the obligation and the validity of contracts and that hence the *lex loci contractus* applies and controls."

In Edwards v. Kenzey, 96 U. S. 595, it was said: "The laws which subsist at time and place of making a contract enter into and form a part of it," and "the obligation of a contract includes

everything within its obligatory scope" and "among these elements nothing is more important than the means of enforcement."

Also it was ruled in Miller v. Wilson, 146 Ill. 523, that the *lex loci contractus* embraces both the obligation and the remedy. See also Burr v. Beckler, 264 Ill. 230.

Third Natl. Bank v. Steel, 129 Mich. 434, 88 N. W. 1050, 64 L. R. A. 119, decides as does the instant case, but it is purely on the ground that the *lex fori* applies. The court said: "The question involved was whether a contract valid in the state where it was entered into could be enforced in this state" in view of the statute regarding non-enforceability under statute of frauds section. It was held that the rule of the *lex fori* governed.

It seems to us that the distinction spoken of in Illinois and U. S. Supreme Court cases ought to govern. In the first place, either common or statute law of a state has no extra territorial operation and in the second place, it does not seem, that there is public policy involved in such a statute so as to cut out any rule of comity. It is not in the way of condemnation of consideration of a contract, that it is unenforceable. It only means, that regarding contracts within reach of the statute they are not enforceable in the courts of a state. But if our view is the correct one, why is not a contract sued on within statutory time of its making enforceable in another state, notwithstanding that by the law of the forum it has become barred? C.

JETSAN AND FLOTSAM.

AMERICANITIS.

The Century Dictionary defines "Americanitis" as an "overwhelming national conceit of the United States especially when shown or expressed by vulgar brag or noisy braggadocio."

This definition aptly characterizes a featured article of our contemporary, Case and Comment, for September, 1917, which goes under the rather misconceived heading, "Americanism."

"Americanism" is defined by Webster as being a "custom peculiar to the United States; an American characteristic or idea; a word or phrase peculiar to the United States."

Under this term of reproach signifying "peculiarity" and "provincialism" in the use of words or ideas, the writer, Hon. Barton E. Sweet, delivers himself of many ridiculous, inaccurate and boastful expressions concerning the exclusiveness and supremacy of American ideals.

"Americanism," says Mr. Sweet, "is one of the grandest words in the English language. It

has become symbolical of civil and religious liberty on the western continent. It represents the shining goal toward which the human race has been tending since time began."

If the term Americanism, hitherto regarded as one of condescension, if not of derision, has in it the wide range of signification here claimed for it in Mr. Sweet's opening paragraph, our great dictionaries require immediate revision.

Elaborating still further an idea that had already overflowed its narrow banks, Mr. Sweet goes on to say:

"We find epitomized in it the struggles, the hopes, the dreams, and the aspirations of man for better days and better things, since the time when he cringed and crawled in the dens and caverns of barbarism, and groaned and felt his way through the long night of the stagnant centuries toward the dawn of a grander day, up to the present hour, when we behold him revealed, standing upright, with the sunlight of heaven in his face, or walking with uncovered head beneath the silent stars, contemplating as to the handiwork of the Creator and the betterment of the human race."

Historically, America is the product of the centuries, but she is not the only flower of historical evolution. Greece and Rome developed civilizations in many respects as wonderful as our own, and the world is still acknowledging its unpaid debt to Roman civilization for developing legal principles to a point hardly yet reached either in America or in any other modern nation.

Nor can our own history be separated from the struggles of our English progenitors. Magna Charta gave us our Constitution and the development of the representative idea in government is English rather than American.

Surely we can be patriotic and intellectually honest at the same time. We can show our love for our country without being ridiculous or provincial in doing it.

Possibly with the extreme generosity of Americans we are ready in all such instances to let the spirit in which a thing is done excuse the manner in which it is done. But it seems to us that if ever the scientific spirit is to pervade the thinking of lawyers to a greater degree than it has in the past such loose expressions ought not to be featured in our legal periodicals.

HUMOR OF THE LAW.

Judge Orrin N. Carter, of Chicago says that the general public regards the decisions of courts about as expressed in the following:

"If any 't' shall not be crossed
Or any dot of 'I' be lost,
The grave omissions then shall be
Enough to set defendant free.
So here we have the law; and see
'Here is a naked uncrossed 't'!"

Sir John Kirk, who recently celebrated his fiftieth anniversary of work in connection with the Ragged School Union, tells an amusing anecdote of how he once questioned a London waif whom he had befriended as to his method of earning a living.

The young fellow's reply was typical of the London street arab.

"Well, guv'nor," he said, "it's like this. I picks strawberries in the summer, I picks 'ops in the autumn, in the winter I picks pockets, and as a rule, I'm pickin' oakum for the rest of the year."—St. Louis Star.

Hon. John B. Knox, of Alabama, in an address before the Tennessee Bar Association, said of Andrew Jackson:

"A favorite boast of Jackson's was that his feet 'had never pressed foreign soil,' that 'born and reared in the United States, he had never been out of the country.' It is recorded that he, one day, made this exultant observation in the presence of Mrs. Eaton, whose Irish wit prompted her to enquire, 'But how about Florida, General?'

"That's so. I did go to Florida when it was a foreign country, but I had quite forgotten that fact when I made the remark."

"I expect, General, you forgot that Florida was foreign when you made the trip?"

"The General was put *hors de combat* for a moment, but soon rallied. 'Yes, yes, maybe so. Some weak-kneed people in our own country seemed to think so.'

"Oh, well, General, never mind. Florida didn't stay foreign long after you had been there!"

"This was one of his favorite anecdotes for the rest of his life. Whenever he related it, he would add: 'Smartest little woman in America, sir; by all odds, the smartest!'"

WEEKLY DIGEST

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1. Animals — Promulgating Rules. — Since Tick Eradication Act prescribes no form for promulgation of regulations by board of control of Agricultural Experiment Station, any public act of board in promulgating regulations in manner calculated to convey information to public constitutes promulgation.—*Cazort v. State, Ark.*, 198 S. W. 103.

2. Attachment—Mitigation of Damages. — Where one procures an order dissolving a wrongful attachment and for return of property, and then permits it to be taken on execution by plaintiff in attachment, the latter can show, in mitigation of damages for wrongful attachment, the sale on execution and application of proceeds on the judgment.—*Wade v. Ray, Okla.*, 168 Pac. 447.

3. Attorney and Client—Burden of Proof. — Suit being for reasonable value of plaintiff's services as attorney, it was incumbent upon him to show what services he performed.—*Ives v. Lessing, Ariz.*, 168 Pac. 506.

4.—Misconduct. — An attorney, who solicits funds from the credulous and uninformed to investigate claims of heirs to property, knowing there is no hope of success and that all his theories have been adversely disposed of by the courts, will be disbarred for misconduct.—*In re Gridley, N. Y.*, 167 N. Y. S. 107.

5. Bankruptcy — Allowance to Trustee. — Where receiver in bankruptcy took possession of chattels subject to mortgage, amount of which exceeded their value, and property was subsequently disposed of by trustee, trustee is

entitled to allowances for taxes paid and expenses in preserving property.—*C. B. Norton Jewelry Co. v. Hinds, U. S. C. C. A.*, 245 Fed. 341.

6.—Claim. — Where claims of several petitioners to reclaim goods were separated, it was not an abuse of discretion for referee in bankruptcy to hear together several petitions for reclamation.—*In re Aronson, U. S. D. C.*, 245 Fed. 207.

7.—Concealing Assets. — There was a concealment of property constituting an act of bankruptcy, where debtor, asked by creditor what he had done with money, said he had left it in a safe place, available on a settlement, but that he had off-sets exceeding creditor's claim.—*In re Burg, U. S. D. C.*, 245 Fed. 173.

8.—Custody of Property. — After adjudication, receiver before appointment of trustee is not only in custody of property in his possession, but is proper person, pending appointment of trustee, to carry out orders of court made pursuant to Bankruptcy Act, July 1, 1898, § 2, subd. 15, and receiver should call to court's attention matters suggesting advisability of orders.—*In re Gottlieb & Co., U. S. D. C.*, 245 Fed. 189.

9.—Deposit of Gold Dust. — Deposit of gold dust in bank to account of bankrupt depositor, is not transfer of money as payment or security, and does not operate to diminish estate of depositor.—*American Bank of Alaska v. Johnson, U. S. C. C. A.*, 245 Fed. 312.

10.—Mortgage. — Though mortgagee consented, held that trustee in bankruptcy, who sold chattels subject to mortgage, is not, where it was apparent no surplus would result for benefit of general estate in bankruptcy, entitled to commissions.—*C. B. Norton Jewelry Co. v. Hinds, U. S. C. C. A.*, 245 Fed. 341.

11.—Preference. — Where bankruptcy proceedings are instituted, bill of sale of all his property, executed by bankrupt within four months of bankruptcy, may be set aside, though intended to protect creditors.—*In re Einstein, U. S. D. C.*, 245 Fed. 189.

12.—Preference. — Where, on foreclosure proceedings, stipulations are entered into that mortgagee take over the land as a receiver, pay off certain debts, and receive a salary, a suit by a trustee of the mortgagor, who becomes bankrupt, for an accounting under such stipulation, ratifies the entire stipulation, and payments thereunder are not preference.—*McKnight v. Shadbolt, Wash.*, 168 Pac. 473.

13.—Set-Off. — Where depositor, who was indebted to bank, made deposit in usual course of business, bank's application of amount of deposit to its indebtedness is valid as set-off, under Bankruptcy Act, July 1, 1898, § 68a, and is not preference under § 60a.—*American Bank of Alaska v. Johnson, U. S. C. C. A.*, 245 Fed. 312.

14. Banks and Banking—Contract. — Under contract by national bank to furnish funds needed in conducting business of another institution, the bank was bound to furnish reasonable sums only on proper terms and might refuse payment of overdrafts or advancements not adequately secured.—*First Nat. Bank v. Humphreys, Okla.*, 168 Pac. 410.

15.—Dividends. — Where, contrary to statute and not in good faith, directors of bank declared

dividends out of its capital and purchased for bank its stock, diverted funds may be recovered for subsequent creditors of bank in suit against directors and sellers of stock.—*Jesson v. Noyes, U. S. C. C. A., 245 Fed. 46.*

16.—Imputable Notice.—Knowledge of president of national bank that funds deposited by stockman were derived from sale of cattle mortgaged to plaintiff, held not imputable to bank, so as to charge funds with trust; president and depositor being participants in scheme fraudulent, if not criminal.—*Interstate Nat. Bank of Kansas City, Mo., v. Yates Center Nat. Bank, of Yates Center, Kan., U. S. C. C. A., 245 Fed. 294.*

17.—Overdraft.—If a director of a trust company charged with overdrawing his account parted with the check which was certified, situation as to him was as if drawee had paid it.—*State v. Scarlett, N. J., 102 Atl. 160.*

18. Bills and Notes—Accelerating Payment.—Provision in a mortgage, securing a note payable two years after date, that on default in any interest the whole interest should become payable, related alone to a foreclosure, and did not accelerate time of payment of note, and action on note after first default was prematurely brought.—*Alwood v. Harrison, Okla., 168 Pac. 440.*

19.—Certificate of Deposit.—Bank's certificate of deposit, reading that A had deposited \$4,950, payable to order of himself on return of certificate properly indorsed, and specifying interest payable, was negotiable instrument, being payable on demand under Thompson's Shannon's Code, § 3516a6.—*Easley v. East Tennessee Nat. Bank, 198 S. W. 66.*

20.—Innocent Purchaser.—Where purchaser before maturity of note paid full value therefor, that she knew that payee was indebted to others did not defeat transaction, unless she knew of fraudulent purpose to defraud creditors.—*Whitney v. Day, Ore., 168 Pac. 295.*

21.—Stated Account.—Debtor giving note in settlement of stated account and grossly negligent in not informing himself as to its items, could not plead as defense to action on note that certain items were fraudulently placed in the account, in absence of any artifice preventing his discovery of fraud.—*Gleaton v. Georgia Nat. Bank, Ga., 93 S. E. 1023.*

22. Bridges—Proximate Cause.—Where horse became frightened, apart from any defect in county bridge, and bystander intercepted it on bridge, causing it to wheel and fall from bridge, which had no guard rails, county was not liable, as proximate cause was nature of horse and efforts of bystander.—*Corley v. Cobb County, Ga., 93 S. E. 1015.*

23. Carriers of Goods — Stating Value.—By Act Cong. March 4, 1915, c. 176, the Cummins Amendment to Carmack Amendment to Interstate Commerce Act, interstate carriers are liable for actual loss, notwithstanding limitations of liability in receipt, contract or filed tariff, where goods are hidden by wrapping, etc., unless where they are so hidden, it requires shipper to state their value.—*McCormick v. Southern Express Co., W. Va., 93 S. E. 1048.*

24. Carriers of Live Stock—Limitation in Suit.—Provision of contract for shipment of

live stock, requiring actions for damages to be brought within six months after cause of action accrued, was a bar to action for damages brought after that time.—*St. Louis & S. F. R. Co. v. Talliaferro, Okla., 168 Pac. 438.*

25.—Ordinary Negligence.—Where a railroad engaged to carry mules free for its contractor to do repair work to place where work was to be done, it was liable for ordinary negligence resulting in injury to mule.—*Bush v. Beason, Ark., 198 S. W. 130.*

26. Carriers of Passengers—Baggage.—Where passenger procures another's property to be carried as baggage, the carrier, without knowledge of true ownership, is a gratuitous bailee, and liable to owner only for loss or damage from its gross negligence or willful misconduct.—*Lusk v. Bloch, Okla., 168 Pac. 430.*

27.—Res Ipsa Loquitur.—Doctrine of res ipsa loquitur held not to apply to case of passenger injured by slipping on sill of Pullman car of latest type and in perfect repair.—*Connell v. Oregon Short Line R. Co., Utah, 168 Pac. 387.*

28. Champerty and Maintenance—Agreement to Pay Costs.—Attorney's contract for contingent compensation, whereby he is to pay entire expense, control settlement, and be jointly interested in the property recovered, held unenforceable in equity.—*Jones v. Pettingill, U. S. C. C. A., 245 Fed. 269.*

29.—Possession.—In action to recover part of lot encroached on by building, deed of release from defendants' predecessors, purporting to release to defendants part of lot in question, being void for champerty and made after termination of the dispossessory and after filing of lis pendens, was of no service to defendants.—*Belotti v. Bickhardt, N. Y., 167 N. Y. S. 19.*

30. Commerce—Carriage of Mail.—Interstate transportation of mail held covered by the federal Employers' Liability Act, whether the railroad is acting as a common carrier in such transportation or as an agency of the government.—*Zenz v. Industrial Accident Commission, Cal., 168 Pac. 364.*

31.—Franchise Tax.—Ky. St., § 4077, requiring railway companies to pay franchise tax, does not use the word "franchise" in its technical sense, and the legislature did not thereby undertake to tax the right of either domestic or foreign corporations to engage in business in the state, or levy a tribute on the right of foreign corporations to engage in interstate commerce.—*Baltimore & O. S. W. R. Co. v. Commonwealth, Ky., 198 S. W. 35.*

32. Constitutional Law—Public Service Commission.—An order of the Public Service Commission that street car service must be increased, after hearing on proofs, with opportunity to street car company to appear, is not a taking of property without due process of law.—*Brooklyn Heights R. Co. v. Straus, U. S. D. C., 245 Fed. 132.*

33. Contracts — Substantial Compliance.—Where contract required water intake pipe 800 feet from shore to be buried one foot deep, dredging of ditch 12 inches deep, in which pipe was laid even with bed of lake, held not to show compliance warranting recovery by contractor.—*City of Port Washington v. Thacher, U. S. C. C. A., 245 Fed. 94.*

34. Corporations—Promoters.—Where fraud of promoters of corporation infringed corporate rights of their associates as shareholders, the corporation was a proper party plaintiff in an action against promoters to recover secret profits obtained by fraud.—*Jarvis v. Great Bend Oil Co.*, Okla., 168 Pac. 450.

35. Covenants—Quiet Enjoyment.—Defendant's predecessors having paid taxes on wild lands for seven years next preceding date of deed from defendant to plaintiff, possession rested in defendant, so that his covenant for quiet enjoyment was not broken until plaintiff's possession was disturbed.—*Smith v. Boynton Land & Lumber Co.*, Ark., 198 S. W. 107.

36. Customs and Usages—Violation of Policy.—Under a policy providing that, if there was any benzine on the premises, it would be void, "any usage or custom of trade or manufacture to the contrary notwithstanding," a custom of the business in using a small amount of benzine cannot be shown to excuse the violation of the policy, making it void.—*Ertischek v. New Hampshire Fire Ins. Co. of Manchester*, N. Y., 167 N. Y. S. 58.

37. Damages—Evidence.—In action for injuries at interurban railroad's crossing, it was proper and material for plaintiff to show his inability to use his leg after the accident, and showing was not necessarily objectionable because it appeared on voir dire examination that plaintiff had been subjected to another accident.—*Southern Traction Co. v. Owens*, Tex., 198 S. W. 150.

38.—Punitive.—In an action for alleged unlawful, willful and malicious expulsion of plaintiff from defendant's lodge, punitive damages may be recovered, though no charge of fraud was made.—*Little v. Henry*, S. C., 93 S. E. 1008.

39. Death—Damages.—In action against railroad for death on track, testimony that decedent was industrious farmer, good producer and experienced scientific farmer, was admissible as bearing on question of damages to decedent's next of kin, who lived with him.—*Smith v. Cleveland, C. C. & St. L. Ry. Co.*, Ind., 117 N. E. 534.

40.—Simultaneous.—Relative to issue of simultaneous death, or survivorship, where husband and wife were killed in collision of train with auto, evidence of better condition of health of one held admissible in connection with expert opinion of materiality of such condition.—*Robson v. Lyford*, Mass., 117 N. E. 621.

41. Divorce—Desertion.—To constitute desertion, actual withdrawal of one spouse from the other must be with intent to sever cohabitation, and protestation of lack of such intent is overthrown by persistent and inexcusable refusal for unreasonable time to resume cohabitation.—*Fisher v. Fisher*, W. Va., 93 S. E. 1041.

42. Eminent Domain — Abutting Owner.—Abutting owner is not entitled to compensation for laying out street which is absolute necessity for his use of his own lot.—*Turner v. North Carolina Public Service Co.*, N. C., 93 S. E. 998.

43.—High Water Mark.—Condemnation of land between high and low water marks in bed of river, as part of end of public highway, is not subject to attack in injunction suit by own-

er of land abutting on highway above high water mark because state was not made party to condemnation by legal notice.—*Hale v. Record*, Okla., 168 Pac. 420.

44.—Special Damages.—The owner of land, part of which was taken for construction of a highway, could recover as special damages to the remainder the value of a well which ceased to flow owing to the blasting and excavation done upon the land taken.—*Erie County v. Fridenberg*, N. Y., 117 N. E. 611, 221 N. Y. 389.

45. Estoppel—Plat.—Where plaintiff, an owner of two lots, deeds one according to certain original plat, in action involving boundary, wherein defendants deny any agreed boundary, but claim under the deed, such plat, although later surveys shortened the block, is binding on defendants.—*Boyd v. Miller*, Ind., 117 N. E. 559.

46. Ferries—Trespass.—Landing of ferry boat at or against end of public highway is not ipso facto an injury to or a trespass upon abutting landowner's rights as owner of the fee, being subject to public easement.—*Hale v. Record*, Okla., 168 Pac. 420.

47. Fraud—Fiduciary Relation.—A party to a transaction, by pleading ignorance and inexperience and declaring her reliance on the other party, cannot impose a fiduciary obligation or status on such other party, unless consented to.—*Southern Trust Co. v. Lucas*, U. S. C. C. A., 245 Fed. 286.

48. Frauds, Statute of—Contracts.—Where decedent agreed to leave another realty on his death in return for care and nursing, neither possession of property nor making of improvements by other is requisite to take case out of statute of fraud, his services to decedent not being measurable in money.—*Vellkanje v. Dickman*, Wash., 168 Pac. 465.

49.—Demurrer.—Where writing set out in petition in action for seller's breach of contract of sale did not make a complete contract, and agreed price was over \$50, demurrer to petition on ground that contract was within statute of frauds was properly sustained.—*Evans v. Atlanta Paper Co.*, Ga., 93 S. E. 1023.

50. Fraudulent Conveyances—Innocent Purchaser.—Where grantee of land in consideration of his agreement to support grantor and wife knew of grantor's debt, and that grantor was conveying to him all his property for consideration of doubtful adequacy and one deemed by law constructively fraudulent, he was not innocent purchaser, entitled in equity to compensation for improvements prior to existing creditors of grantor.—*Walker v. Williamson*, Ky., 198 S. W. 10.

51. Habeas Corpus—Appeal and Error.—Writ of habeas corpus will not issue, when the investigation will in effect be an appellate review of what has been determined by some other tribunal of competent jurisdiction, as determination by the established military tribunal of liability to draft, depending on citizenship, in the absence of arbitrary denial of rights.—*United States ex rel. Troiana v. Heyburn*, U. S. D. C., 245 Fed. 360.

52. Highways—Obstruction.—Where plaintiff, with others, had obtained a prescriptive right-of-way across land to a public highway and

there was no other egress to the public road, she was entitled to damages from the county for an obstruction of such road by the lowering of the grade of the main road.—*Morgan County v. Goans*, Tenn., 198 S. W. 69.

53. **Husband and Wife**—Community Property.—An automobile, bought by a wife out of her separate property on a separate property transaction, was not community property, and was not subject to attachment in an action against the husband.—*Rhoades v. Lyons*, Cal., 168 Pac. 385.

54.—Contract by Wife.—Wife entering into contract to buy timber and agreeing to pay stipulated price, is bound by her obligation, though on the purchase the husband's debt on prior sale of same timber to him was to be canceled.—*Bateman v. Cherokee Fertilizer Co.*, Ga., 93 S. E. 1021.

55.—Conveyance.—Grants of rights-of-way made to county by landowners took effect as grants leading to dedication of land to public, though not signed by either of their wives, it being stipulated that they were owners of the land.—*Horton v. Okanogan County*, Wash., 168 Pac. 479.

56. **Indictment and Information**—Presumption.—In an indictment for murder against an infant under 14 years of age, it is not necessary to negative the presumption of his incapacity to commit the crime.—*State v. Vineyard*, W. Va., 93 S. E. 1034.

57. **Infants**—*Compos Mentis*.—To convict an infant under 14 years of homicide, it is necessary to show that he knew or understood the nature and consequence of his act and showed design and malice in its execution.—*State v. Vineyard*, W. Va., 93 S. E. 1034.

58. **Innkeepers**—Invitee.—Where one at defendant's hotel, by invitation of guest, in leaving took circuitous route to freight elevator, where he opened door, insecurely fastened, and fell into shaft and was killed, held there could be no recovery.—*Money v. Travelers' Hotel Co.*, N. C., 93 S. E. 964.

59. **Insane Persons**—Conveyance.—Conveyance by woman 78 years old of about one-tenth of her property to a son in expectation that he would provide a home for her, held not evidence of incompetency requiring a guardian.—*In re Watson*, Cal., 168 Pac. 341.

60. **Insurance**—Changing Beneficiary.—Where insured has right to change beneficiary in life policy, and, in attempt, has met all requirements of policy or statute, except surrender of policy, which is withheld by one claiming rights, equity will deem effort made to change beneficiary sufficient.—*Metropolitan Life Ins. Co. v. O'Donnell*, Del., 102 Atl. 163.

61.—Concurrent Insurance.—Where insurer's agent, issuing policy, permitting concurrent insurance by agreement, knew that insured had other insurance, and without his knowledge attached a slip fixing a limit, policy might be construed or reformed to provide generally for additional concurrent insurance.—*McPherson Mercantile Co. v. Reliance Ins. Co. of Philadelphia*, Kan., 168 Pac. 323.

62.—Depreciated Value.—Measure of recovery under policy covering household furniture, held not the depreciation in market value or in the fair selling value in the market for any purpose to which they may be susceptible.—*Haden v. Imperial Assur. Co.*, Mo., 198 S. W. 72.

63.—Description of Property.—Under policy of insurance covering laces, trimmings and embroideries, including samples and supplies, the word "supplies" cannot be held to cover benzine

kept in violation of all policy, though it was necessarily kept to dye laces.—*Ertischek v. New Hampshire Fire Ins. Co. of Manchester*, N. Y., 167 N. Y. S. 58.

64.—Fraternal Society.—Beneficiary under a policy of a company organized under the life insurance laws, as distinguished from a fraternal or mutual benefit association, takes a vested interest, which cannot be impaired by act of assured, and the company without her assent.—*Lloyd v. Royal Union Mut. Life Ins. Co.*, U. S. D. C., 245 Fed. 162.

65.—Salary of Agent.—Where insurance company agreed to pay agent \$200 a month on condition he secured insurance to \$50,000 during each 90 days, agent failed to perform, and made other agreement, whereby amounts were reduced to \$20 per week, which were paid, in insurance company's suit against him on his notes on advances not earned, chancellor properly denied him relief on claim that \$200 payments were salary.—*Mutual Life Ins. Co. of New York v. Miles*, Ky., 198 S. W. 30.

66. **Intoxicating Liquors**—Illegal Sale.—Purchase by defendant of 2½ gallons of wine in sealed jugs on premises of manufacturer, who made same from fruit grown on premises, held not to show violation of law, for manufacturer to sell or for defendant to purchase and have in possession under Pub. Laws 1911, c. 85, § 3, Pub. Laws 1913, c. 44, Pub. Laws 1915, c. 97.—*State v. Hicks*, N. C., 93 S. E. 964.

67. **Landlord and Tenant**—Invitee.—Where plaintiff came on demised premises as implied invitee of tenant, who used same for a store, plaintiff cannot, having received injuries, recover from lessor on theory that, as he allowed platform in which was defective trapdoor to be used by public, he was bound to maintain it in repair.—*Beaulac v. Robie*, Vt., 102 Atl. 88.

68. **Libel and Slander**—Charging Crime.—Statement that plaintiff had no right to sell a piano, and that she knew it was mortgaged, held not actionable per se as charging a crime under Ky. St., § 1358, which required that the mortgage be "of record."—*Sengel v. Pierson*, Ky., 198 S. W. 1.

69.—Libelous per se.—Article entitled, "Misstatements of (?)" and charging untruthfulness, held libelous per se, within Rev. St. 1911, art. 5595, as exposing person to hatred, ridicule, or financial injury.—*Hibdon v. Moyer*, Tex., 197 S. W. 1.

70. **Mandamus**—Banking Commissioner.—Banking commissioner's discretion must be exercised within limits prescribed by statute, and when incorporators have placed themselves within requirements of law he may be required by mandamus to approve articles of incorporation.—*Speer v. Dossey*, Ky., 198 S. W. 19.

71. **Master and Servant**—"Arising Out of Employment."—An employee, leaving employer's premises and injured by a fall while reaching for rail of outside stairway he was descending while other employees were rushing down stairway, received an injury "arising out of his employment."—*In re O'Brien*, Mass., 117 N. E. 619.

72.—Course of Employment.—Bricklayer, employed by lithographing and printing company to repair wall of its plant, was engaged in employment requisite to company's business, and injury received while so doing arose out of and in course of employment carried on for pecuniary gain.—*Dose v. Moehle Lithographic Co.*, N. Y., 117 N. E. 616, 221 N. Y. 401.

73.—Fellow Servant.—The employer is not ipso facto liable for injuries to a servant through the act of a fellow servant merely because he employs fellow servants who cannot speak the English language, but the alleged incompetency must be the proximate cause of the injury.—*Barber v. Smealie*, N. Y., 117 N. E. 611, 221 N. Y. 407.

74.—Negligence.—It was inexcusable negligence for yardmaster to open switch and leave it open without a switch tender, as to gang of workmen passing through yard in motor car furnished by company, where track was apparently free of switching operations.—*Thode v. Louisiana Ry. & Nav. Co.*, La., 76 So. 587.

75.—Negligence.—It is actionable negligence on part of master to stretch skidder cable, by which logs are being dragged from woods, close

beside and behind woodsman, who is felling timber, and thereby cut off his escape from falling timber.—*Fletcher v. Ludington Lumber Co.*, La., 76 So. 592.

76.—Renewal of Employment.—One employed for a year at a stated salary, who continued in that service after the period, was presumed to be employed for another year, although from time to time increases were made in the salary.—*Stewart Dry Goods Co. v. Hutchison*, Ky., 198 S. W. 17.

77.—Simple Tool.—Sledge hammer made by employer's head smith, its handle being placed for servant to use in striking, who never had used a sledge before, equipped with a defective handle, was not a simple tool which an employer need not inspect.—*Sante Fe Tie & Lumber Preserving Co. v. Collins*, Tex., 198 S. W. 164.

78.—Workmen's Compensation Act.—A school teacher received an injury "arising out of the employment," within the Compensation Act, where she was injured in shoving over a heavy desk not in its accustomed place, to enable her to get a book from a case, required to facilitate her school work.—*Elk Grove Union High School Dist. v. Industrial Acc. Commission of State of California*, Cal., 168 Pac. 392.

79. Mines and Minerals—Lease.—Under oil and gas lease for five years, and so much longer as either mineral is produced in paying quantities, the production required to effectuate such extension is that which will bring a reasonably pecuniary return in excess of cost of production.—*Barbour, Stedman & Co. v. Tompkins*, W. Va., 93 S. E. 1038.

80. Mortgages—Record Title.—Where record title to dwelling place of husband and wife was in a corporation owned by the husband, a mortgagee is not called upon to investigate the rights of the wife in such property.—*Houts v. First Trust & Savings Bank*, Cal., 168 Pac. 383.

81.—Right of Redemption.—As a general rule, a mortgagor who has conveyed the equity of redemption by warranty deed to a third person cannot maintain a bill to redeem.—*Watson v. First Nat. Bank*, N. M., 168 Pac. 488.

82. Municipal Corporations—Abutting Owner.—One whose place of business abutted upon sidewalk was not guilty of negligence, or violation of any ordinance in piling empty chicken coops on outer side of walk while express wagon was coming to take them away.—*Whittle v. Southern Express Co.*, La., 76 So. 623.

83.—Ordinance.—Ordinance of city council which forbids owner or agent of property to rent same to prostitute, but does not forbid him to rent his property for purposes of prostitution, is null and void.—*City of New Orleans v. Piazza*, La., 76 So. 598.

84.—Res Gestae.—In action for injuries in collision with automobile, court properly refused to permit plaintiff to be questioned as to what he had said concerning damage done to defendant's automobile in collision, fact only, not what plaintiff said, being material.—*Townsend v. Keith*, Cal., 168 Pac. 402.

85. Navigable Waters—Marshes.—Stream flowing through marsh or tidelands, never used or regarded as navigable except for small boats, and which it was impracticable to use without deepening it, held not a navigable stream.—*North American Dredging Co. of Nevada v. Mintzer*, U. S. C. A., 245 Fed. 297.

86. Negligence—Accident.—Express company whose driver while backing his wagon to sidewalk curbing struck shipper's employee while he was trying to get empty coops out of wagon's way, so that he fell against plaintiff passing on sidewalk, was not liable for plaintiff's injury.—*Whittle v. Southern Express Co.*, La., 76 So. 623.

87.—Imputability.—Where plaintiff and owner of an automobile agreed upon a trip at joint expenses, and the automobile was struck by a train, plaintiff was a joint adventurer, and as such the negligence of the owner of the car in driving it upon the track was imputed to him.—*Derrick v. Salt Lake & O. Ry. Co.*, Utah, 168 Pac. 385.

88. Principal and Agent—Counter-claim.—In action for money received by agent for the sale of automobiles, the agent cannot recover on counter-claim expenses of trips to the principal

office to adjust alleged overcharges made by plaintiff.—*J. W. Leavitt & Co. v. Dimick*, Ore., 168 Pac. 292.

89. Railroads—Look and Listen.—Where one approaching railroad crossing is familiar with situation, he must use greater care as danger is greater; must, as he approaches, look from place where he can see, and listen from place where he can hear—an imperative duty so long as there is any need of its exercise.—*Cathcart v. Oregon-Washington R. & Nav. Co.*, Ore., 168 Pac. 308.

90. Reformation of Instruments—Laches.—Where a deed in April, 1909, contained mistaken descriptions of property, and the grantee made some claim of ownership in 1912, or 1913, but did not attempt to take possession until July, 1914, the grantor was not guilty of laches in failing to sue for reformation of the deed until January, 1915.—*Hagge v. Moran*, Wyo., 168 Pac. 248.

91. Sales—Fraud.—Seller of jitney bus was not guilty of actionable fraud by promising buyer that if his venture should fail to be financial success it would procure contracts from individuals and firms for profitable use of car, and by failing to fulfill such agreements.—*Fleming v. Gerlinger Motorcar Co.*, Ore., 168 Pac. 289.

92.—Guaranty.—That contract described trees as "on myrobalan roots" of itself constituted guaranty that trees sold should be grafted on myrobalan roots.—*Burge v. Albany Nurseries*, Cal., 168 Pac. 343.

93.—Notify Bill of Lading.—Where seller ships goods on buyer's order, "on usual terms delivered," and forwards bill of lading with draft attached, with direction to notify buyer, the title does not pass without clear proof of contrary intention of parties.—*Allen & Wheeler Co. v. Farr*, W. Va., 93 S. E. 1030.

94.—Speculative Contract.—Rule that, where parties knowingly enter into a speculative contract, they assume the risk, does not apply to sale of newspaper routes, in respect to continuance of publication.—*Kirtley v. Perham*, Cal., 168 Pac. 361.

95. Street Railroads—Crossing Accident.—One driving team across street railway track and having unobstructed view for quarter of mile in direction from which car came, and who attempted to cross without trying to ascertain movement of cars and was struck, was negligent.—*Moses v. Northwestern Pennsylvania Ry. Co.*, Pa., 102 Atl. 166.

96.—Negligence of.—Where defendant's motorman knows or should know that fire automobile is coming at great speed, and runs his car out on crossing suddenly, forcing automobile to swerve to walk, injuring plaintiff, company is negligent.—*King v. San Diego Electric Ry. Co.*, Cal., 168 Pac. 131.

97. Trusts—Express Trust.—When the settler, the trustee, the cestui que trust, the property transferred to the trustee, and the object to be attained, all appear with reasonable certainty from the writing, the requirements of the law are satisfied, and an express trust is thereby established.—*Holsapple v. Schrontz*, Ind., 117 N. E. 547.

98. Vendor and Purchaser—Evidence.—Where one is induced to purchase land by false and fraudulent representations in prospectus, letters and orally, it is not proper to admit parts of prospectuses having no relation to false representations relied upon.—*Berrendo Irrigated Farms Co. v. Jacobs*, N. M., 168 Pac. 483.

99.—Executory Contract.—Where purchaser fails to perform his executory contract, and vendor is not in default, purchaser cannot recover money or property advanced, nor obtain affirmative relief as to cancellation of mortgage given on other land to secure part of consideration.—*Kershaw v. Hurtt*, Okla., 168 Pac. 202.

100. War—Alien.—Where employee was killed prior to war by United States against Germany, and deceased's mother was an alien, resident in Austria-Hungary, to which declaration of war had not been extended, appeal from a judgment dismissing her action will not be dismissed on ground that she was an alien enemy.—*Taylor v. Albion Lumber Co.*, Cal., 168 Pac. 348.

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WHAT SHALL THE LAWYERS DO TO WIN THE WAR?

On December the seventh, we published an editorial stating that the war would be fought in two phases—the one in the trenches and the other behind the lines—and that the two efforts were of equal importance, because of their correlation. A call was made upon American lawyers to take the lead as officers in organizing the important work necessary to be carried on behind the lines.

From the earnest, patriotic and well known lawyer, wishing to be of real service, came the inquiry for more definite suggestions. Almost coincident therewith there appeared in the daily press a cartoon depicting the Kaiser mockingly extending his hand to a sleeping American citizen and requesting him to "Shake Hands, Friend."

The first commission, therefore, is to wake up America and particularly those good and earnest citizens who imagine they are awake but who are walking in their sleep. To say that such people know that America is involved in a desperate war would be to admit that one comfortably seated in his library arm chair, smoking a costly Havana, knew that his residence was on fire. Manifestly, if awake, he would be bestirring himself to do something and to do everything that would protect his home from destruction. Once really awake to danger the initiative of his resourcefulness would be equaled by the effectiveness of his intelligence. The trained mind of the lawyer, like the drilled discipline of the officer, would intuitively direct him where leadership

beckoned and where organization lacked or languished.

But, what is meant by carrying on the war behind the lines? That too, may be treated in two phases—the one as to the government and the other as to the people.

The first is in sustaining and encouraging spiritually the President and the entire government, that they may reach out with a mighty arm strong driven by the consciousness of duty well performed and the sustaining plaudits of a grateful and appreciative people. In the midst of the carnage and the strife, words of confidence and approval stimulate the dignified and mature spirit of a great and trusted chief executive and a seasoned and honored Congress, no less than that of the young hero on the gridiron. No man can do his best confronted by a silent people and the unvocal question it imports.

But, this voice must be that of America and not that of the letter writer. It must be so clearly distinct in its volume as to require no ear upon the ground; so musical in its inspired tone as to need no band for leadership, and so earnest in its determined effort as to quicken the stagnant blood of the indifferent.

No, America does not need a revival of patriotism. She requires a quickening of a sense of service. America does not need censure. She deserves local leadership. Traditional energy, initiative and verve await to be marshalled in the battalion and assigned to duty under the guidance of men prepared to direct the execution of the orders of the commander-in-chief at Washington and his aides. It is deeds that are needed and performance will follow organized leadership.

Does one have to search the records for these orders, for a signal to start, or are they still sounding upon the ear-

drums of conscience like the command to charge the enemy, for that is what they mean. Let us be more specific.

Are the lawyers energetically and cheerfully performing the duties involved in the important work of the Legal Advisory Boards? Or, are they begrudgingly donating an hour here and there, the while complaining of the loss of income incurred. Are they systematically reporting when and where assigned like military guardsmen, conscious of a second duty, or are they erratically strolling in at convenience? Let every lawyer answer these questions.

So important is it that the proposed classification of registrants shall command the respect and confidence of the people, that one would not dare prophesy the result of failure. A deep and widespread sense of dissatisfaction over the order in which our young men shall be called to the front will be a greater disaster than the loss of a battle, aye, many battles. Disunion at home means disunion in the trenches.

Let us never forget that the fighting spirit of the men in the trenches is measured by the object they have gone out to achieve—the preservation of democracy and all it implies—freedom, fairness, justice and equal opportunity under the law. Are the lawyers seeing to it that the splendid and scientific program for classification, conceived by the Provost Marshal General, is being properly executed. If not, drive into their very souls the certainty of danger and an exalted sense of duty in the circumstances.

Millions of dollars are being spent upon cantonments, forts and other public works. Is proper return in service realized? Manifestly, the answer is in the negative. Who is at fault? Is it the system employed by the respective governmental departments? Is it the craft-

iness and covetousness of contractors who are mindful only of increasing the account upon which they are to receive ten per cent, who pay extravagantly for material, and who pad pay-rolls by encouraging slothfulness in service? Or, is it the indifference of the workman to the dire need of the Nation in its hour of stress.

Our sons and brothers are dying of pneumonia and its kindred diseases caused by exposure and inadequate housing due to unexpected slowness of construction. Whatever may be the trouble it can and must be reached by the organized effort of the people. They will send these men the message that every man is a soldier and every soldier is expected to do his duty; that failure or refusal is traitorous as surely as if a trench or a fort had been betrayed to the enemy. If churches, chambers of commerce and civic organizations have not done this, has any lawyer suggested it? It is worthy of thought? These men, too, need to hear the voice of the people, but not in acclaim. It must be in a condemnation carrying the conviction of the determined will of the American people.

The need of economy and of conservation of food and fuel has long since been too patent to require the official "regulation" of a patriotic nation fully awake. There is something wrong with a people who willingly surrender their sons and who need to be driven into giving up a petted dish or a small degree of heat. Both of these traits of character are the children of habit and not the free offering of a patriotic spirit—the splendid habit of obedience to the government. But that is not enough. This lack of individual spontaneity and initiative denote lethargy awaiting duress. Instead, a great majority should be themselves intuitively doing the right

thing and driving the recalcitrants to it by the weight of their irresistible, organized wills.

As public sentiment has controlled this country in peace, so it will dictate its policy in the war. If wrongs are being committed and advantage being taken of the stress of circumstances; if men are not unselfishly responding to the many calls of service and sacrifice made upon their assumed patriotism, it is because public sentiment is unvocal and unorganized, for there can be no doubt of its existence. Will the lawyer be that voice? Will he be the Paul Revere of 1918 carrying the countryside to war? That is where he can serve.

The Red Cross soldiers are not found only on the battle front of France and Italy and in the devastation, sorrow and sickness of Belgium. Without uniforms or insignia they walk the streets and highways of the country gathering, organizing and assembling the substance upon which the uniformed men and women are sustained and with which they do their angelic work of mercy. Are the lawyers leading and striving in this propaganda, or are their eyes lifted away from the ordinary labor awaiting and appealing to them, to the imaginary heroic scenes upon bloodstained battle fields. Are they doing their bit for the Liberty Loan? Are they encouraging economy that war expenses may be paid out of income? To such it may be said that greatness consists of performing cheerfully and patiently the inconspicuous things of life. It is the ensemble that appears big. The measure of patriotism in this war is not going to be the sword alone, but unselfish, patriotic civilian service as well. Awakening, educating and organizing public sentiment to a profound sense of the reason for this war and their duty to mankind in sustaining it at whatever cost, is a

sacred duty, as it will be a highly beneficial act. And these things make up the second phase of the lawyers' work.

When the American Bar Association officially placed the organized Bar at the command of the government, it tendered a corps of men with highly trained minds who in times of peace are the compensated advisors and leaders of the people. What is expected of them in times of war needs no further explanation. They are on trial. It may be before a people themselves made unvocal by indifference. It may be the silence of compassion. But the day is coming when service will be recognized and recorded. Then the sins of omission will arise ghost-like at the banquet table of noble deeds well performed.

THOMAS W. SHELTON.

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS — SUPPLYING COAL AND WOOD TO INHABITANTS AT COST.—In *Jones v. Portland*, 38 Sup. Ct., 112, the judgment of Maine Supreme Judicial Court, sustaining the validity of a state statute authorizing any city or town to establish and maintain within its limits "a permanent wood, coal and fuel yard for the purpose of selling at cost, wood, coal and fuel to its inhabitants" is affirmed.

Justice McReynolds defers to local courts as to their knowledge of conditions as concerns the incidence of police power, saying that: "Local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information," and, therefore, the sustaining of this legislation by the local courts is upheld.

He further says that: "It is not the function of this (U. S. Supreme) court under the authority of the Fourteenth Amendment, to supervise the legislation of the states in the exercise of the police power beyond protecting against exertions of such authority in the enactment or enforcement of laws of an arbitrary character, having no reasonable relation to the ex-

cution of lawful purposes, we are unable to say that the statute now under consideration violates rights of the taxpayer by taking his property for uses which are private."

Then it is stated as a fact that authority in a municipality to furnish water and light by means of its own plants has long been recognized as a public purpose and the same principle includes the right of a state to authorize it to furnish heat. "Heat is as indispensable to the health and comfort of the people as is light or water."

This case is one of specifically conferred power and it scarcely would cover a case where a municipality might appropriate money to supply coal and fuel, without the establishment of a plant or system. A casual appropriation in an emergency might not be justified. And then, it does not appear, if a legislature having supposedly equal knowledge of local conditions as have its courts, enacted such a statute as is considered, and it was not sustained by its courts, how a jurisdiction without the same knowledge would regard the matter.

At all events, it seems to us that the Fourteenth Amendment is quite flexible in its application under the principle announced some time back that police power represents the "predominant public opinion" of a neighborhood. The statute on its face would seem rather to be in the nature of a measure of relief for a particular class of people and not one for general advantages to all.

CONSTITUTIONAL LAW—AID BY STATE TO RELIGIOUS INSTITUTION.—In Dunn v. Chicago Industrial School for Girls, 117 N. E. 735, decided by Supreme Court of Illinois, it was held that payment by a county to an incorporated Catholic School under the control and management of the Roman Catholic Church was not in violation of State Constitution forbidding any appropriation in aid of any sectarian purpose to help support any school or academy controlled by any church, where the payment is an amount less than the costs for care, attention and training for Catholic girls committed to the school by the juvenile court.

It appeared that the institution was conducted by a religious order of the Roman Catholic Church and there was allowed to it for each girl child sent to it \$15 per month: that the cost of such care in state training schools was \$28.88 per capita per month; that this Catholic school had adequate facilities for giving

the care and attention agreed to be given and the state board issued to it certificate of competency.

The court rejected the contention that wards could not be committed to institutions where religious doctrines are taught, and said: "The constitutional prohibition against furnishing aid and preference to any church or sect is to be rigidly enforced, but it is contrary to fact and reason to say that paying less than the actual cost of clothing, medical care and attention, education and training in useful arts and domestic sciences is aiding the institution where such things are furnished."

It certainly seems to be an aid partially to pay for such attention, but to deny that the prohibitive words embrace such payment is to say, that the religious feature prevents a state or county from making a good business arrangement, which it, otherwise, might adopt. And then the giving of aid must be thought to mean making an appropriation in favor of a religious institution where it enters into no contractual arrangement to give value received in consideration of the appropriation. The question appears to us somewhat close, but it is to be noted, that the opinion was unanimous.

WORKMEN'S COMPENSATION ACT—INJURY TO THIRD PERSON ASSISTING A SERVANT.—In *State ex rel. Nienaber v. District Court*, 165 N. W. 268, decided by Supreme Court of Minnesota, the Chief Justice dissenting, the facts show that relator was engaged in the coal and fuel business; that one of his wagons was mired in the mud, and his servant, the driver, requested an employe of a city, driving a street sprinkler, to pull him out; that the city employe hitched his team to the pole of the coal wagon; that his foot was stepped on by one of his team and badly mashed. It was held there was implied authority in this emergency for relator's employe to request this service and award in favor of city employe was justified. This ruling was affirmed.

The court thought that the service rendered, though casual, was in the usual course of relator's business and amounted to employment upon implied authority in an emergency.

The Chief Justice thought that compliance with the request did not amount to entrance into relator's employment, and that "in assisting relator's driver out of the mire, plaintiff acted the part of the Good Samaritan, a kindly volunteer, and not as an employe."

This dissent appears to us well based, unless the Workmen's Compensation Act specifically otherwise provides. It is not within

the ordinary purview of such acts to create a relation of master and servant which otherwise would not exist. And kindly acts, from the performance of which no contractual relation is expected to arise, ought not to bring consequences not anticipated. Furthermore, we greatly doubt whether relator's employe, notwithstanding the supposed emergency, responsibly could have bound his employer to agree upon any compensation for such service. An employer has the right to select his servants, except, it may be conceded, that if an employer's property were about to be destroyed, an outsider might be called in to save it. Compensation then might be recovered for on the theory of salvage, but not on that of employment.

THE TWENTY-EIGHT-HOUR LAW AS CONSTRUED IN PENAL ACTIONS.—PART I.*

No attempt will be made in these notes to collect the authorities relating to the effect of the Act, or the violation thereof, on the liability of the carrier to the owner of the stock; nor the cases in the state courts where the law has been construed incidental to the determination of actions for loss or damage. The scope of the notes is to determine the liability of the carrier to the United States for the penalty. As only one penalty of the maximum amount of \$500 is usually involved in the cases there is seldom an appeal to the United States Supreme Court.¹ The result is that the different lower courts have construed certain provisions of the law variously and these divergent views have not been harmonized by higher authority.

Scope of the Act.—Briefly summarized, the Act prohibits the confinement of interstate shipments of cattle, sheep, swine, or other animals in cars or vessels for more than twenty-eight consecutive hours with-

out unloading into suitable pens for rest, feed and water for at least five consecutive hours, unless such unloading is prevented "by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight." The limit of confinement may, however, be extended to thirty-six hours upon the written request of the owner or person in charge of the stock, but such request must be "separate and apart from any printed bill of lading, or other railroad form." In the case of sheep it is specially provided that it shall not be required that they be unloaded in the nighttime, but where the time limit (*i. e.* 28 hours) expires in the nighttime they may continue in transit to a suitable place for unloading "subject to the aforesaid limitation of thirty-six hours." The carrier who "knowingly and willfully" fails to comply with the provisions of the statute is made liable to a penalty of not less than one hundred nor more than five hundred dollars. Where the animals are carried in cars or vessels in which they can and do have proper food, water, space and opportunity to rest, the requirement that they be unloaded is dispensed with.

To Whom Does the Act Apply.—By its terms the law applies to any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which the animals shall be conveyed from one state into or through another state, treating the Territories and the District of Columbia as states, and to the owners or masters of any vessel transporting them from one state into or through another state. In the former statute receivers were not mentioned and it was held that they were not subject to the Act since penal laws must be strictly construed.²

*Part II will appear next week.

(1) Judicial Code § 241. Baltimore & O. S. W. R. Co. v. U. S., 220 U. S. 94.

(2) U. S. v. Harris, 177 Fed. 305.

It has been held in many cases that terminal railroad companies are embraced by the Act,³ though they issue no bills of lading and receive no part of the through freight rate, doing only switching service for the trunk lines or for industrial plants on their lines.⁴ It is no defense that such terminal carrier acts merely as the agent of the line haul carrier.⁵ In U. S. v. Union Pacific R. Co.,⁶ however, it was held that the initial carrier could not escape liability by showing that it had delivered the shipment to a terminal company within the time limit, it appearing that the terminal company was not an independent carrier and did not hold itself out to the public as such, but acted merely as an agency of the several line carriers against whom it charged up its expenses in proportion to the service rendered to each. The court held that the initial carriers' responsibility did not end until it had delivered the shipment to the next connecting (*i. e.* line haul) carrier.

It has been suggested that a terminal company or other carrier which does not move the stock towards their destination but merely receives them from a line carrier for the purpose of carrying them to the pens for unloading, feed and water, and then returns them to the line carrier at the point where it received them is not subject to the Act, since such movement is a diversion from, and not a part of, the carriage from the point of origin to final destination. This point was raised but not decided in U. S. v. Stockyards Terminal Co. (Minn.).^{6a} There seems to be

(3) Northern Pac. Term. Co. v. U. S. (Ore.), 184 Fed. 602; St. Joseph's Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

(4) U. S. v. Sioux City Stock Yards (Ia.), 162 Fed. 556; U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625; U. S. v. Nor Pac. Term. Co. (Ore.), 181 Fed. 879; U. S. v. Chicago Jct. Ry Co. (Ia.), 211 Fed. 724.

(5) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947.

(6) 213 Fed. 332 (Utah).

(6a) 178 Fed. 19.

little basis in the language of the statute to support such a position.

Shipments Subject to the Act.—All interstate shipments are governed by the Act, including a shipment between two points in the same state if the route lies through another state; but such shipment passing en route through Canada or Mexico is not subject to the Act. But where a shipment from a point in one state to a point in another state passes through Canada it is held to be subject to the Act and the time consumed in Canada may be counted in computing the lawful period of confinement. Such construction of the Act does not make it invalid on the ground of extraterritoriality. In U. S. v. Lehigh Val. R. Co. the court said on this point:⁷

"It is urged in behalf of the defendants that, if the time occupied in the transportation of the cattle through Canada is included in computing the period of detention, the effect will be to give to this law an extraterritorial force. The general rule is, of course, fundamental that the penal laws of one country have no force in another country. But, in my opinion, that rule has no application in these cases. The offense with which these defendants are charged is continuing the confinement of the cattle in this State after the term of confinement permitted by the statute has expired. It is, of course, true that their confinement in New York would not have constituted an offense without their previous confinement, part of which was in Canada; but the previous confinement in Canada or elsewhere is not a part of the offense, although a fact necessary to its existence."

Upon the same principles the carrier was held guilty where the time limit expired while the shipment was in Canada, the defendant's default having been that it continued the confinement for an hour after the stock had re-entered the United States.⁸ It is clear that the law has no application

(7) U. S. v. Lehigh Val. R. Co. (N. Y.) 184 Fed. 971.

(8) Grand Trunk Ry. Co. of Canada v. U. S. (N. Y.), 191 Fed. 803.

to a movement entirely within the limits of one state or territory, and it was so held under the old law.⁹

Kind of Animals.—The statute says, "cattle, sheep, swine or other animals." It has been held that horses and mules are embraced by the words "other animals."¹⁰ In the case reported 18 Fed. it is intimated that the law is limited to quadrupeds, and in the Virginia case it is pointed out that the statute is primarily humane, as indicated by its title, rather than a sanitary regulation, hence, the phrase, "other animals," should be held to include all animals that might be shipped in crowded cars or boats and which would suffer in like manner with cattle, sheep and swine, for the want of food, water or rest. Both cases hold that the statute is not restricted to animals used for food.

When Unloading Not Required.—Section 3 provides that "when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply." In the first case arising under this section it was intimated by the court that the cars provided need not be sufficiently large to permit all the cattle to lie down at the same time¹¹; but it was later held to the contrary by the Circuit Court of Appeals, the court observing that it would be difficult to arrange an agreement among the cattle to take turns at lying down.¹² It is not enough, however, for the carrier to show that the stock had suf-

(9) U. S. v. East Tenn. V. & S. R. Co. (Tenn.), 18 Fed. 642; U. S. v. Louisville & N. R. Co. (Tenn.), 18 Fed. 480.

(10) U. S. v. L. & N. R. Co., 18 Fed. 480; C. & O. Ry. Co. v. American Ex. Bk., 92 Va. 495, 44 L. R. A. 449; Baltimore & Ohio S. W. R. Co. v. U. S. 220 U. S. 94.

(11) U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 186 Fed. 541.

(12) Erie R. Co. v. U. S. (N. Y.), 200 Fed. 406; U. S. v. Erie R. R. Co. (N. Y.), 191 Fed. 941; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

ficient space in the car, and that the caretaker had undertaken to see that they were properly fed and watered and had been given the opportunity to feed and water them. The animals must actually have had the proper food and water.¹³ Lack of knowledge that they were not receiving proper attention is no defense to the carrier. Where the shipment was in patent cars provided with pans for watering, the carrier is guilty if it fails to water them for 28 hours, or if the pans were so constructed that they were tipped up and spilled the water so that some of the cattle could not get any.¹⁴

When Period Begins and Ends.—The statute provides that in estimating the time of confinement the time consumed in loading and unloading shall not be considered. Does this mean that the time begins to run as to a particular animal from the time it is loaded into the car, or that the time begins on the whole carload from the time loading of the car is complete? Suppose there are several carloads belonging to one or more shippers and consigned to one or more consignees, being loaded concurrently at the same station for the same train. Does the time begin to run on each car from the time its loading is complete, or is each shipment to be considered separately, or may the loading of all the stock be regarded as one transaction? These questions are answered in Baltimore & O. S. W. R. Co. v. U. S.,¹⁵ holding in such case that the loading of all the cars may be considered as one act if it be not discontinuous or unduly prolonged, so that the time would begin to run from the completion of loading of the last car. The fact that the

(13) Chicago, B. & Q. R. Co. v. U. S. (Neb.), 195 Fed. 241; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

(14) U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 186 Fed. 541. Note.—The evidence in these patent car cases indicated that the minimum space required for large cattle was a width of 2½ feet per head, that being the requirement of law regulating carriage of livestock on vessels.

(15) 220 U. S. 94; 55 L. Ed. 384.

ownership of the stock is in different persons is immaterial. And even where cattle were loaded at different stations within a few minutes of the same time, and the cars consolidated into one train, it has been held that—to use the language of the court¹⁶—"there was practically but one offense, and the slight difference in the time when the lawful period expired is insignificant, and therefore, giving the statute a reasonable construction, may be disregarded."

Since time consumed in unloading is not to be counted the statute is satisfied if the unloading is commenced within the time limit, subject to the condition implied in the Baltimore & Ohio Southwestern case, supra, that the process of unloading must not be discontinuous or unduly prolonged. The law puts the responsibility primarily on the carrier to see that the stock are unloaded within the prescribed time. Hence where the caretaker told the carrier's agents that he would find the consignee and tell him that the car was ready to be unloaded, and have him unload it, the carrier must still show that it used reasonable diligence to have the car unloaded within the time limit.¹⁷ When the defendant initial carrier delivers the shipment to connecting line within the time limit it would seem that it does not incur liability for the penalty though the connecting line should fail to unload within the required time, and it has been so held in a case where it appeared that the connecting line received the shipment in sufficient time to have carried it to the stockyards and unload it within the time limit.¹⁸ The question of whether the connecting line had time enough to unload within the time limit would seem to be immaterial, however, since the defendant did not confine the stock

beyond the lawful time and the Act does not make it liable for default of succeeding lines. The protection of the latter in such case is in their right to refuse to receive the stock if they cannot do so without violating the law. The true distinction would seem to be whether the succeeding line is an independent carrier or a mere agent of the defendant. This aspect of the matter is not discussed in the case cited, but in another case¹⁹ it was held that the initial carrier could not excuse itself by showing delivery to a terminal company within the time limit, where such terminal carrier was not an independent carrier holding itself out as such to the public, but a mere agency of the trunk lines, which contributed to the expense of maintenance of the terminal company in proportion to the service it rendered to each. The court held the initial carrier was liable for the default of its agent the terminal company, which was employed by it and not by the shipper. In the court's opinion the first carrier's liability does not end until the shipment is delivered to the next connecting (*i. e.* line haul) carrier.

A carrier receiving a shipment already confined beyond the limit and carrying it with due diligence to its pens, convenient to the junction point, for unloading has been held not liable for the penalty on the ground that its handling of the stock was a part of the unloading,²⁰ but the contrary has also been held in a case where it is said that the time spent in unloading embraces only that space of time required in putting the animals off the car.²¹ In most cases the question of liability under such circumstances is made to depend on wheth-

(19) U. S. v. Union Pac. R. Co. (Utah), 213 Fed. 322.

(20) U. S. v. Lehigh Val. R. Co. (N. Y.), 184 Fed. 971; U. S. v. Delaware, L. & W. R. Co. (N. Y.), 206 Fed. 513; St. Louis, M. B. & T. Co. v. U. S. (Ill.), 209 Fed. 60.

(21) U. S. v. Nor Pac. Term. Co. (Ore.), 181 Fed. 879.

(16) U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

(17) Ore.-Wash. R. & N. Co. v. U. S. (Idaho), 205 Fed. 337.

(18) Missouri, K. & T. Ry. Co. v. U. S., 178 Fed. 15.

er the carrier acted knowingly and willfully.

Delivery to the consignee within the time limit ends the liability of the carrier. Thus where the bill of lading called for delivery on the consignee's private track, but custom required that the cars be placed opposite a runway on the track which was the only practicable place for unloading them, the carrier is not liable if it places a car of stock at the runway and notifies the consignee before the expiration of the time limit, though the consignee fail to unload within the prescribed time; but mere placing of the cars on the side track at a point not opposite the runway is not a complete delivery and the carrier is liable if the stock are confined overtime. It is no defense that there was a car at the runway being unloaded when the car in question arrived.²² There are cases where the cars were placed at consignee's pens after business hours²³ or during a storm,²⁴ but as these decisions seem to turn on the question of willfulness rather than on whether there was a good delivery they will be considered under that head.

Unloading in Transit.—The law prohibits the confinement of stock in cars or boats "for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours." Suppose the stock are confined first in cars twenty-five hours then unloaded into pens, but such unloading is not in compliance with the statute because not done in a humane manner or the pens are not suitably equipped, or the stock are not fed or watered, or because they are not allowed to remain in the pens five hours before being reloaded into the cars and sent

on their way. What is the situation? Is an offense committed as soon as the twenty-eight-hour period counting from the time of first loading has elapsed? The general purpose and spirit of the Act suggests that this question be answered in the affirmative, but since the statute is penal familiar rules of construction require that it be construed strictly in favor of the defendant, and the correct view on principle is believed to be that in the case stated the carrier is not liable unless and until the confinement *in the cars* exceeds the prescribed time. To violate the law the stock must be confined in *cars or vessels* over twenty-eight *consecutive* hours and the Act itself provides that it is its intent "to prevent their *continuous* confinement" beyond the twenty-eight hour period. In the hypothetical case they are not confined in cars or vessels for twenty-eight consecutive hours. It may well be held that the consecutiveness or continuousness of the confinement cannot be broken within the meaning of the Act except by unloading in the manner prescribed, but it is difficult to see how the time the animals are in pens can be counted as a part of the offense of confining them *in cars* beyond the lawful period. The question is not fully answered by the decisions. The point was clearly raised in U. S. v. Lehigh Val. R. Co.,²⁵ but the court refused to decide it and disposed of the case on other grounds. The opinion of the trial court is quoted, however, which accords with the writer's view. The facts in the case were that the animals had been unloaded into the pens after twenty-one hours' confinement and had remained in the pens twelve hours, but without feed, and had then been loaded on a barge and confined thereon four hours and forty-five minutes.

(22) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 206.

(23) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207.

(24) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 211.

(25) (N. J.), 204 Fed. 705. The interpretation suggested as the proper one would be in large measure destructive of the Act and probably would not be sustained by the Supreme Court. Balto. & O. R. Co. v. Pitcairn, 215 U. S. 481; Tex. & P. Ry. Co. v. Abeline, 204 U. S. 426.

Other decisions seem to take the view without clearly stating it, that the carrier is not entitled to deduct the time the animals may have been in pens en route, unless their unloading therein is in conformity with the statute. Thus where the carrier unloaded the cattle within the time limit, but only for three hours, and then reloaded and forwarded them, it was held to have incurred the penalty upon the expiration of the time limit counting from the time of the first loading without any allowance for the three hours.²⁶ And where the carrier confined the stock in cars overtime, and then unloaded them for only three hours, it was held to have twice violated the Act and rendered itself liable for two penalties. It was no excuse that the owners requested that only three hours' rest be allowed or that it was only a very short run to final destination.^{26a} The holding that the failure to rest the stock five hours in the pen as prescribed by the statute constituted a violation of the law would seem to be clearly erroneous since the statute prohibits only the excessive confinement of stock in cars or vessels. Where the railway company has provided itself with proper pens, suitably located and sufficient for the reasonable accommodation of traffic, it cannot be held liable where, in order to avoid confining cattle in the cars overtime, it is compelled, on account of various delays which could not have been expected, to unload them in pens at an intermediate station not properly equipped, since its act though knowingly done is not willful.²⁷

Thirty-six Hour Release.—The limit of confinement is 28 hours except "that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and

(26) U. S. v. New York C. & H. R. R. Co. (N. Y.), 221 Fed. 1000.

(26a) U. S. v. Delaware, L. & W. R. Co. (N. Y.), 220 Fed. 944.

(27) St. Louis & S. F. R. Co. v. U. S. (Mo.), 169 Fed. 69.

apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours." Such release when executed is one of the "contingencies hereinbefore stated" which excuses the carrier for confining the stock beyond the statutory twenty-eight-hour period.²⁸ The request may be made by the owner or by an agent to whom he has intrusted the shipping of the livestock, and may be made either before the movement commences or during transportation; it need not be induced by any unforeseen contingency. It may be on a railroad form provided such form is separate and apart from the bill of lading or any other railroad form. A request partly in printing and partly in handwriting is good.²⁹ A special written request must be made for each shipment. General written instructions from the shipper applicable to all future shipments, though confirmed orally as to the particular shipment do not constitute a compliance with the law.³⁰ It has been held, however, that the Act does not require the request to be on a virgin sheet, for, says the court, the law "requires the separateness of the request as a request and not the separateness of the paper or material on which it is written." Applying these principles, a request written on the bottom of the waybill and signed by the shipper was held to be sufficient.³¹ An agreement between the carrier and shipper to confine the stock over thirty-six hours is void and affords the carrier no protection even in a civil action by the shipper for damages.³²

(28) U. S. v. Pere Marquette R. Co. (N. Y.), 171 Fed. 586.

(29) Wabash R. Co. v. U. S. (Mo.), 178 Fed. 5; Atchison, T. & S. F. R. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 168 Fed. 15 (The sufficiency of the request is for the determination of the court).

(30) U. S. v. Pere Marquette R. Co. (N. Y.), 171 Fed. 586.

(31) Mobile & O. R. Co. v. U. S. (Ill.), 209 Fed. 605. See also Nor. & W. Ry. Co. v. Steele (Va.), 86 S. E. 124, where the release was by indorsement in shipper's handwriting on margin of bill of lading.

(32) Webster v. Union Pac. R. Co. (Col.), 200 Fed. 597.

Sheep.—The effect of the special proviso as to sheep is not to authorize their confinement in any case beyond thirty-six hours, but merely to permit the carrier, without any release from the shipper, to continue their confinement until they reach a suitable place for unloading, but not exceeding thirty-six hours where the twenty-eight-hour period expires in the nighttime.³³ Where it is obvious that the thirty-six-hour period will expire in the nighttime it is the duty of the carrier to unload before dark.³⁴

JOHN PURYEAR.

Washington, D. C.

(33) U. S. v. Atchison, T. & S. F. Ry. Co. (Ill.), 166 Fed. 160; U. S. v. Atchison, T. & S. F. Ry. Co. (Kan.), 185 Fed. 105.

(34) Southern Pac. Co. v. U. S. (Cal.), 171 Fed. 360.

EMINENT DOMAIN—ABANDONMENT.

YORK SHORE WATER CO. v. CARD.

Supreme Judicial Court of Maine.
Nov. 24, 1917.

102 Atl. 321.

Water company having begun proceedings to condemn land for its site, an award of damages having been made and confirmed, without appeal therefrom, could not thereafter abandon the proceedings, the property owner having acquired a vested interest in the award.

CORNISH, C. J. The York Shore Water Company was authorized and empowered by its charter "to take and hold, by purchase or otherwise, any lands or other real estate necessary * * * for the protection * * * of said Chase's pond," its source of supply. Pr. & Sp. L. 1895, c. 125, § 3, and Pr. & Sp. L. 1911, c. 256, § 3.

"Said corporation shall be liable to pay all damages that shall be sustained by any persons by the taking of any lands or other property * * * and if any person sustaining damage as aforesaid and said corporation cannot mutually agree upon the sum to be paid therefor, such person or said corporation may cause the damage to be ascertained in the manner prescribed by law in case of damage by laying out highways." § 4.

In furtherance of the power of eminent domain thus conferred, the directors of the com-

pany on September 6, 1913, voted to take by purchase or otherwise certain land situated on the northerly side of Chase's pond, a portion of which belonged to this defendant. On December 22, 1913, the company duly filed in the office of the county commissioners of York County a declaration and description of said real estate, as the first step towards taking the same by condemnation proceedings, and in conformity with R. S. 1903, c. 56, § 11. This declaration alleged that the company "finds it necessary for its purposes and uses in the protection of the watershed of Chase's pond in said town of York to take land within the limits of the watershed of said pond in said town of York, and being duly authorized by law to take such land whenever it is necessary for its purposes and uses. Therefore, said York Shore Water Company has taken and hereby does take a certain tract," as described in a certain plan filed therewith.

The defendant as owner of a portion of the land so taken, on the 7th day of July, 1914, filed with the county commissioners a petition containing a copy of said taking, asking that board to fix a time for hearing, to view the premises, hear the parties, and assess the damages in the manner provided by law. After due notice given to the company, a hearing was had on August 13, 1914, at which both parties were present and participated. On November 3, 1914, the county commissioners filed their award, assessing damages in the sum of \$1,100 and ordering the company to pay that amount to the owner, Mr. Card.

No appeal was taken from this award, but on March 24, 1915, the company executed, and on March 31, 1915, delivered to Mr. Card a written notice of so-called abandonment and surrender of the condemnation proceedings and of the property taken thereunder.

After reciting the facts relating to the declaration and description of December 22, 1913, except that it is now said to have been made "with a view of taking the same for the purposes of said corporation as for public use," this notice of abandonment alleges that the company has never entered upon the premises or taken possession thereof, and that it "hereby abandons and surrenders up to you all its right, title and interest if any, in said premises, and thereby notifies you of its intention not to take said property or make any claims thereto under said proceedings."

Mr. Card disregarded this notice of abandonment and on the first Tuesday of January, 1916, more than a year after the award had been

made, he filed with the commissioners a petition, asking that a warrant of distress issue against the company to compel the payment of the award.

On February 23, 1916, the company brought this bill in equity to restrain the further prosecution of that petition, and upon bond given by the company a temporary injunction was granted. Subsequently the cause was reported to the law court on bill and answer.

The main point at issue is the legal right of the company to abandon its eminent domain proceedings at the time it attempted to do so, on March 24, 1916.

Plaintiff claims that, independent of the statute above considered, it had the general right to abandon its eminent domain proceedings at any time before the same were finally closed and rights of appeal had elapsed, even after hearing and award by the county commissioners. At what stage a condemnor may abandon condemnation proceedings has been frequently considered by the courts, both of England and of this country, and a learned and valuable summary of authorities may be found in the note to Cunningham v. Memphis R. R. T. Co., 126 Tenn. 343, 149 S. W. 103, 30 Ann. Cas. 1058-1062.

These authorities, however, depend to a great extent upon the general statutes of the respective jurisdictions, or the special act under which the condemnation is authorized, and therefore in most instances can hardly be regarded as precedents here. Generally speaking, they are divided into two groups; one group, and perhaps the larger, holding that the rights of the parties are not vested until the award is paid or the land is occupied; the other group holding that by the confirmation of the award the rights of the parties are vested and abandonment is then precluded. The author of the above note states the principle as follows:

"In the absence of statute fixing the time within which a discontinuance may be had, the general rule is unquestioned that an eminent domain proceeding may be discontinued at any time before the rights of the parties have become reciprocally vested."

The question then arises, at what stage in the proceedings have the rights of the parties become reciprocally vested? This is answered by our own court in these words:

"We regard it settled by the great weight of authority that, after such proceedings have been perfected and the damages for the land taken have been finally ascertained and adjudged by the proper tribunal, the corporation

thereby acquires a vested right to hold and use the land taken on payment of the compensation awarded and that the landowner acquires a vested right to have and recover the damages awarded." Furbish v. County Commissioners, 93 Me. 117-129, 44 Atl. 364, 367.

In that case eminent domain proceedings were instituted by a water company, and the company itself petitioned the county commissioners to estimate the damages. Hearing was had, report filed, and at the next regular term of the county commissioners the report was entered on the docket as accepted and the proceedings closed. Subsequent to this the company attempted to abandon the proceedings and the court held that it was too late. The only difference in facts between that case and the case at bar is that the time of taking an appeal had expired, and the report of the commissioners had been accepted at the next term of the commissioner's court, and before the notice of abandonment had been given. But we do not regard these difference as affecting the rights of the parties here, and we are of opinion that in this case, as in the Furbish case, the attempt at discontinuance came too late. The acceptance of the report by the same board who had made it was a merely routine matter, which affected neither the validity nor the force of the award.

Nor is the fact that the time for appeal had not expired when the notice of abandonment was given, material. The award of the county commissioners stood as a judgment until and unless it was appealed from. No appeal had been entered when the attempt to abandon was made and none has since been filed so far as the record shows. That award then in this case was existing at the time the abandonment notice was given and the owner of the land had a vested right to have that award paid subject to be divested by an appeal and by a subsequent award by the appellate tribunal. Under these circumstances we think that the criterion laid down in the Furbish case for the limit of the right of abandonment governs here. By its taking the company had acquired a vested right to hold and use the land on payment of the compensation awarded, and by the hearing and award Mr. Card acquired a vested right to have and recover the damages awarded. See Kimball v. Rockland, 71 Me. 137; Imbescheid v. Railroad Co., 171 Mass. 209, 50 N. E. 609; Hellen v. Medford, 188 Mass. 42, 73 N. E. 1070, 69 L. R. A. 314, 108 Am. St. Rep. 459; Turner v. Gardner, 216 Mass. 65, 103 N. E. 54.

In State v. Bangor & Brewer, 98 Me. 114, 128, 56 Atl. 589, 594, this court said:

"When Bangor and Brewer had each, at a legal meeting of their voters, consented to take or purchase the bridge, to make it free, as provided in the Acts of 1895 and 1901, and the value of the bridge property had been determined, the rights of all parties became vested and the statutes then became imperative upon both cities to pay the price awarded by the committee, and to take the bridge under eminent domain as authorized by § 1 of the statute of 1901. The bridge company had no option, and neither Bangor nor Brewer could, by any action at any meeting called subsequently to that in which the vote had been had, rescind their former vote or escape the duty imposed by the Act of 1901."

In *Sprague v. No. Pac. Ry. Co.*, 122 Wis. 509, 100 N. W. 842, 106 Am. St. Rep. 997, it was held that after the report of the commissioners was filed, it had the effect of a judgment and after judgment there can be no discontinuance.

The conclusion at which we have arrived is consistent with justice and fair dealing. To hold otherwise is to make a farce of legal proceedings. To permit a corporation after taking property from its owner by the high hand of eminent domain, and having its value determined by designated tribunal, and the award made, to then repudiate at its will the entire proceeding and vanish from legal sight, is to play fast and loose with the rights of property. If the award is deemed too large the corporation has its right of appeal, but it cannot substitute abandonment for appeal, otherwise the property of private citizens would be at the mercy of public service corporations. A voluntary non-suit cannot be taken after an adverse verdict rendered.

If the plaintiff's contention is sound, what would hinder a corporation from condemning and abandoning the same property as many times as it might see fit, until finally an award has been secured that is satisfactory? A doctrine that would permit such a procedure would be a travesty on justice.

We think the safe and sound and logical rule is that concisely stated by the author of the recent Digest of Maine Reports, as follows:

"The result of an award on proper proceedings is to give both parties a vested interest; one to the property and the other to payment, a result which neither can avoid." Lawrence's Dig., Vol. 1, p. 392.

The entry will therefore be:

Temporary injunction dissolved.

Bill dismissed, with costs.

NOTE.—Recovery for Discontinuance of Proceedings in Condemnation.—It appears to be peculiarly a statutory question whether and at what time there may be an abandonment in eminent domain proceedings. Largely this is true as to the damages, if any, recoverable by the

landowner for trouble and expense brought about because of the initiation and abandonment of such proceedings. But it may be thought that there may be more a general question of law involved in the latter than the former situation.

In *Meridian & M. Ry. Co. v. Betheze*, Miss., 72 So. 233, there was a proceeding begun for condemnation and a dismissal by the plaintiff. Suit was instituted under statute for recovery of "all reasonable expenses including attorney fees" incurred in defending the suit, in cases where the judgment has not been paid within a certain time or where the suit is dismissed by plaintiff. In this case recovery was allowed for attorney fees, a sum for defendant's loss of time and a further sum paid another to assist in preparing defendant's case.

In *Winkelman v. Chicago*, 213 Ill. 360, 72 N. E. 1066, a proceeding in condemnation was begun in 1890, the cause was tried in 1895, a judgment in condemnation in 1896, and in 1897 the petition was dismissed. The landowner sued for damages, counsel fees and expenses in and about the proceeding for condemnation. Plaintiff for general damages showed he acquired title after the condemnation action was begun and the property decreased in value. He sought to show what he could have sold the property for but for the pendency of the condemnation proceeding and its value after the dismissal. This the trial court rejected. It was said that "the right to recover is based, not upon the fact that there is delay in determining to abandon the proceeding after the amount of damages is fixed and resulting damages to the land, but upon the theory that the delay in prosecuting the suit has been wrongful, or that the abandonment was not determined upon a reasonable time after the award had been fixed." It was held there was right to recover, but recovery for counsel fees and expense in the trial was denied, because there was absolute right to discontinue, but nothing appeared to authorize any particular damage.

In *Owen v. Springfield*, 83 Mo. App. 557, the statute does not appear to declare for any recovery by landowner where there is abandonment, but the court said that the reported cases in the state showed the rule to be that if there was abandonment the corporation is liable for damages sustained in defending the suit, and this is true whether dismissal of the proceeding be voluntary or by order of court.

In *Ford v. Board of Park Comrs.*, Iowa, 126 N. W. 1030, there was a proceeding to condemn for a public purpose, and there was abandonment. The property sought to be condemned was by the owner leased to another and a building in course of erection for the lessee. The tenant was lost and the owner was compelled to remodel the building for another purpose. It was said: "As the defendant was purely a governmental agency vested among other things, with judicial and legislative powers, which it could exercise at its discretion * * * the doctrine of *respondeat superior* does not apply and the board is not liable for the torts or wrongs of its agents, whether done negligently or maliciously."

Re Pittsburgh, 243 Pa. 392, 90 Atl. 328, holds that where a proceeding for opening a street has

been abandoned, the city shall pay costs and actual damages, loss or injury and this does not include any sums paid in procuring expert testimony or any loss or injury occasioned by depreciation of market value, deprivation of its use or the loss of an advantageous lease. It was said: "Here the city in proceeding to condemn appellant's property for public use was exercising a right conferred by statute. If as an incident to the proper exercise of this right, appellant lost the advantage of a lease, which otherwise would have been contracted for, it was a case of *damnum absque injuria*."

In Monroe v. City of Woburn, 220 Mass. 116, 107 N. E. 413, the claim was very similar to that in the Pittsburgh case, *supra*, and a similar holding was made on the theory that the loss claimed was in speculative profits.

These city cases may not be conclusive of those in which the corporation is not governmental in character, but on the theory that damages arising out of the exercise or attempted exercise in good faith, resolves itself into an action where the loss is *damnum absque injuria*, these cases are persuasive. C.

CORRESPONDENCE

INDUSTRIAL COURTS.

Editor Central Law Journal:

Referring to my article on industrial courts, which you published in your issue of November 16, 1917, I may add the suggestion that it has been my judgment that if strikes are to be avoided, that some tribunal would have to be created in which both parties may be represented, and have an opportunity to present their grievances from the viewpoint of each side, and then that such impartial tribunal determine the question in dispute. There is no sense in having boycotts, lock-outs and sabotage in this enlightened day, any more than there is in having the old wager of battle restored. Private parties have to submit their grievances and disputes to a tribunal, and I have never been able to see why labor questions should not be settled in the same way. To compel a large number of employees to quit work for days, weeks or months to better their conditions and to establish a permanent scale of wages is utterly absurd. The loss that results is very hard to bear for them, and can never be made good, and besides a great many innocent parties are bound to suffer and ultimately the community must bear the loss. It is one of the remarkable conditions that we

have provided tribunals for the adjustment of all sorts of controversies, but when it comes to employer and labor on a large scale, then apparently lawlessness must be resorted to by either one or the other in order to determine the rights of the parties.

Yours truly,
FRED H. PETERSON.
Seattle, Wash.

BOOK REVIEW.

COSTIGAN'S CASES ON LEGAL ETHICS.

While there may be differences among law teachers as to the best method of teaching legal principles, there will hardly be two opinions about teaching legal ethics. This subject must be taught by the case method. When taught by any other method it smacks of sermonizing and its abstractions are as unreal to the student as metaphysics or moral philosophy. The failure in teaching legal ethics, hitherto the rule rather than the exception, is to be attributed to the abundance of "glittering generalities" and the paucity of concrete illustrations.

The cause for this failure is removed by the surprising and interesting collection of cases and practical observations on the subject of legal ethics by George P. Costigan, professor of law in Northwestern University. We use the word "surprising" advisedly, for we know of no other attempt in the history of law or jurisprudence to bring together the actual cases and authorities which declare the history, the reasons and the application of the rules of legal ethics.

Of course, the author was favored by a recent development of bar association procedure, whereby special committees have been authorized to declare the rule of professional conduct in concrete cases submitted for their opinion. These opinions, and especially those of the New York County Lawyers Association, have accumulated to such an extent as to furnish a ruling on the most important problems of legal ethics.

Moreover, the American Bar Association's Canons of Professional Ethics has made definite and certain the principles of legal ethics which were very largely up to that time, hazy

abstractions. These canons have also served to make uniform the regulations of professional conduct throughout the country, since practically every bar association has adopted them as the basis for its own local code.

The extent of the author's researches is made apparent by the multitude of references and quotations as well as by the wide range of subjects and authorities consulted.

The reported cases and the quotations from histories, text books and magazine periodicals are arranged under a classification which is largely the author's own invention. Mr. Costigan was in this respect blazing a new trail and is to be congratulated upon the splendid execution and commendable enterprise which brings to the profession a collection of cases (shall we say "readings," since in so many instances they are entertaining excerpts rather than long quotations) on the subject of legal ethics, which are of great interest and value not only to the teacher of this subject in the law schools, but also to the practitioner and all those interested in higher standards of professional conduct.

Printed in one volume of 616 pages and published by the West Publishing Co., St. Paul, Minn.

BOOKS RECEIVED.

Zoline on Federal Appellate Jurisdiction and Procedure, with forms. By Elijah N. Zoline of the New York and Chicago Bar; member of the Bar of the Supreme Court of the United States. Revised by Stephen A. Day, of the Chicago and Cleveland Bar; member of the Bar of the Supreme Court of the United States. Clark Boardman Company. New York. 1917. Price, \$6.00. Review will follow.

A Treatise on Federal Taxes, including those imposed by the War Tax Act of Congress of 1917, the Income Tax Law as Amended, and Other United States Internal Revenue Acts Now in Force; with Commentaries and Explanations, References to the Rulings and Regulations of the Treasury Department and Pertinent Decisions of the Courts. By Henry Campbell Black, LL.D., Author of Treatises on Income Taxes, Bankruptcy, Rescission of Contracts, Constitutional Law, etc. 1917. Vernon Law Book Company. Kansas City, Mo. Price, \$6.00. Review will follow.

HUMOR OF THE LAW.

Pat O'Flaherty, very palpably not a prohibitionist, was arrested in Arizona recently, charged with selling liquor in violation of the prohibition law. But Pat had an impregnable defense.

His counsel, in addressing the jury said:

"Your honor, gentlemen of the jury, look at the defendant."

A dramatic pause, then:

"Now, gentlemen of the jury, do you honestly think that if the defendant had a quart of whiskey he would sell it?"

The verdict, reached in one minute, was "Not guilty."

"Never cross-examine an Irishman," advised a prominent lawyer. "Yes, I'm speaking from experience," he continued. "The only witness who ever made me throw up my hands and leave the courtroom was a green Irishman. A shunter had been killed by an express train and the widow was suing for damages. I was engaged by the railway company and had a good case, but made the mistake of trying to turn the main witness inside out.

"In his quaint way he had given a graphic description of the fatality, occasionally shedding tears and calling on the saints. Among other things, he swore positively that the whistle was not sounded until after the whole train had passed over his departed friend. Then I thought I had him.

"Look here, McGinnis," said I, "you admit that the whistle blew."

"Yes, sorr, it blew, sorr."

"Now, if that whistle sounded in time to give Michael warning, the fact would be in favor of the company, would it not?"

"Yis, sorr, and Mike would be testifyin' here this day."

"The jury giggled.

"Never mind that. You were Mike's friend, and you would like to help his widow; but just tell me now what earthly purpose there could be for the engine driver to blow that whistle after Mike had been struck?"

"I phresume that the whistle wor for the next man on the line, sorr."

"The widow got all she asked."—St. Louis Times.

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
Last Resort and of ALL the Federal Courts.**

*Copy of Opinion in any case referred to in this digest may be
procured by sending 25 cents to us or to the West Pub. Co. St.
Paul, Minn.*

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1. Adverse Possession—Color of Title.—Where adverse claim of title to real estate is based on judgment secured by complainants against stranger to title bearing name similar to that of owner, they must prove that they acquired color of title in good faith, under honest impression that judgment was taken against proper party.—Marvin v. Witherbee, Col., 168 Pac. 651.

2.—Continuity.—Purchaser of land by bringing suit for specific performance against railway company on theory that his vendor was its agent, held to have broken the continuity of his adverse possession.—Central Pac. Ry. Co. v. Tarpey, Utah, 168 Pac. 554.

3. Attorney and Client—Disbarment.—Proceeding seeking disbarment of attorney at law cannot be instituted or maintained by ordinary writ of summons and attachment.—Philbrick v. Creed, Mass., 117 N. E. 637.

4.—Evidence.—In suit for legal services held proper to introduce judgment roll in former case to show that plaintiff had gone over same ground and did not have to labor so hard as represented.—Shepherd v. Inman-Poulsen Lumber Co., Ore., 168 Pac. 601.

5.—Relationship.—The relation of attorney and client, entitling client to summary proceeding under Judiciary Law, § 475, for collection

by attorney, held to exist between one to whom claim was assigned, pending action thereon, and attorney, then prosecuting and continuing to prosecute it.—In re Lahm, N. Y., 167 N. Y. S. 217.

6. Bankruptcy—Assignment.—Assignment or pledge of life policies, executed by bankrupt several years prior to filing of petition in bankruptcy, cannot be set aside, though he be adjudicated bankrupt.—In re Baird, U. S. D. C., 245 Fed. 504.

7.—Insolvency.—Where insolvent conveys to creditor who knew or had reason to believe that conveyance would give him a preference within Bankr. Act, § 60a, and debtor was adjudicated a bankrupt within four months, the trustee in bankruptcy might, under section 60b, avoid conveyance, except to extent that present consideration was paid.—Payne v. Sehon, Steven-son & Co., W. Va., 94 S. E. 34.

8.—Insurance Policy.—Under Bankruptcy Act July 1, 1898, § 70a, insurance policies having cash surrender values, though payable to persons other than the bankrupt, held to pass to the trustee, where the bankrupt had an absolute right to change the beneficiary.—Cohen v. Samuels, U. S. S. C., 38 S. Ct. 36.

9.—Review of Findings.—On review of an order of the referee, his findings, not apparently erroneous on the face of the report, are final, where the evidence is not reported.—In re Golub, U. S. D. C., 245 Fed. 512.

10.—Stock Subscriptions.—Order of bank-ruptcy court directing trustee of bankrupt cor-poration to institute suit in equity to collect stock subscriptions held insufficient to confer equity jurisdiction.—Kelley v. Gill, U. S. S. C., 38 S. Ct. 38.

11. Banks and Banking—Damages.—National bank's want of authority to act as broker in negotiating loan for another is available as de-fense to bank, in action against it by lender, for whom it acted, for damages from its failure to lend on sound security.—Pollock v. Lumber-men's Nat. Bank of Portland, Ore., 168 Pac. 616.

12.—Withdrawal.—Where, by contract of de-posit, money was received in the name of the wife of the depositor under the agreement that the depositor might make withdrawals on checks to which he should sign his wife's name per his own name and he did withdraw money deposited, the wife cannot recover the amounts of the withdrawals.—Moore v. Citizens' Bank of Ashburn, Ga., 94 S. E. 90.

13. Bills and Notes—Demand.—If a note was in the bank at which it was made payable, or payment was demanded there, on the day when due there was a sufficient demand on the maker to fix the liability of an indorser.—Kerr v. Dyer, Me., 102 Atl. 178.

14.—Fraud.—In the indorsee's action on a note alleged to have been procured by fraud, the indorsee could not rely on the failure of the maker to comply with certain conditions em-bodyed in the contract, under which the note was given, since, if there was fraud, it vitiated the contract, as well as the note.—Peterson v. Hoffiezer, S. D., 164 N. W. 1029.

15.—Laches.—After suit was twice tried and settled by execution of cognovit note, on

which judgment was entered, and action was brought on the judgment, held, that defense that note originally sued on was a forgery was barred by laches.—*Westwater v. Murray*, U. S. C. C. A., 245 Fed. 427.

16. **Carriers of Goods—Bill of Lading.**—Bill of lading, stating that shipment was carbonated nonalcoholic beverage, held not to give carrier conclusive notice of inherent quality of goods, where it further recited that contents and condition of contents were unknown.—*Michelod v. Oregon-Washington R. & Nav. Co.*, Ore., 168 Pac. 620.

17.—**Limitation of Liability.**—Provision of express receipt that rate was based upon value held to limit carrier's liability, though appearing on the back of receipt and not in the body of the contract.—*Strong v. Wells Fargo & Co. Express*, S. D., 164 N. W. 967.

18. **Carriers of Passengers—Contributory Negligence.**—A passenger must go inside the car, and if injured while standing upon platform and not showing that there was any unoccupied room inside or that it was impracticable for him to reach it, he is negligent.—*Panek v. Scranton Ry. Co.*, Pa., 102 Atl. 274.

19.—**Intending Passengers.**—Plaintiff, on waiting platform to take defendant's local interurban electric cars, then about due, was entitled to protection as passenger.—*Verrill v. Androscoggin Electric Co.*, Me., 102 Atl. 179.

20. **Conspiracy—Evidence.**—To support charge of conspiracy to conceal bankrupt's assets, held, that actual commission of crime, or verbal expression of purpose to have bankrupt become such, was not necessary, nor was it material whether the proceedings were voluntary or involuntary.—*United States v. Fischer*, U. S. D. C., 245 Fed. 477.

21. **Contracts—Absolute Promise.**—One contracting to do certain work takes the risk, within the limits of his undertaking, of being able to perform, though the old rule has been abated somewhat in determining the scope of the undertaking by the literal meanings of the words alone.—*Day v. United States*, U. S. S. C., 38 S. Ct. 57.

22.—**Construction.**—Under a contract licensing defendant to produce a play, declaring that plaintiff should not be liable for losses, held, that defendant could not, from plaintiff's share of profits of second season, take proportionate share of losses resulting from the first season's production.—*West End Theater Syndicate v. Shubert*, N. Y., 67 N. Y. S. 250.

23.—**Entire Contract.**—Contract for rendition of services as motion picture star for photoplay production must of necessity be treated as entire contract, for star could not appear in only portion of photoplay.—*Corrigan v. E. M. P. Producing Corp.*, N. Y., 167 N. Y. S. 206.

24. **Conversion—Equity.**—Where a will devised property to executors in trust for testator's wife, and after her death to sell all the property and divide the fund among his children and their heirs, there was a conversion of the real estate into personal property at testator's death, as to issue of a child surviving the testator and the widow.—*Hyers v. Titus*, N. J., 102 Atl. 250.

25. **Corporations—Assignment.**—Where president of corporation signed assignment and power of attorney for transfer of stock, request by assignee's cashier that president transfer stocks upon corporation's books was a sufficient demand.—*Commonwealth v. Camp*, Pa., 102 Atl. 205.

26.—**Insolvency.**—Where insolvent corporation sells all its property and distributes proceeds to stockholders, who receive it with knowledge of all facts, they will be accountable therefor to corporation's creditors, notwithstanding their contribution of individual rights to induce sale.—*Lingle v. Farmers' Mut. Telephone Co.*, Neb., 164 N. W. 1052.

27.—**Receivership.**—On application of receiver for allowance of claim against insolvent corporation made after time limited for presenting claims, court properly considered merits of claim where it could be determined by inspection of written contracts not in dispute.—*Standard Lithographing & Printing Co. v. Twin City Motor Speedway Co.*, Minn., 164 N. W. 986.

28.—**Stockholder's Liability.**—Bona fide purchasers in open market of certificates issued by voting trustees of corporate stock, calling for delivery of full-paid stock on termination of trust, held not liable as subscribers for unpaid stock.—*Clark v. Johnson*, U. S. C. C. A., 245 Fed. 442.

29. **Damages—Pleading and Practice.**—Mere absence of demand for damages, where complaint states facts from which damages would naturally flow, and also alleges facts of damage, does not render statement of cause of action insufficient.—*Doctor v. Reiss*, N. Y., 167 N. Y. S. 193.

30. **Divorce—Alimony.**—Where a wife got divorce for adultery and the husband married the guilty woman, alimony of \$3,200 per annum for wife and child, where the husband's property if put into a 5 per cent investment, would give an income of \$9,243, will not be held excessive, although wife has estate of \$11,000.—*Andreas v. Andreas*, N. J., 102 Atl. 259.

31.—**Evidence.**—In suit for divorce on ground that wife shot at husband, it was within the discretion of the court to allow or refuse to allow the jury to have the pistol and the coat worn by the husband in the jury room.—*Fowler v. Fowler*, Col., 168 Pac. 648.

32. **Domicile—Transfer Tax.**—In transfer tax proceeding held, on the evidence, that decedent, describing himself as "of the city of New York temporarily sojourning in Paris," where he had a home, had not shown his intention to abandon his New York domicile.—*In re Blumenthal's Estate*, N. Y., 167 N. Y. S. 252.

33. **Eminent Domain—General Appearance.**—In railroad's proceedings to condemn land, action of landowner's counsel in going into open court and stipulating that court might enter order for occupancy, agreeing to amount of bond, etc., held general appearance by landowner.—*Ogden, L. & I. Ry. Co. v. Jones*, Utah, 168 Pac. 548.

34. **Entoppel—Administrative Officers.**—Estopel against United States held not to arise from fact that administrative officers treated land erroneously meandered as subject to riparian

rights of abutting owners and not subject to disposal by the United States.—Lee Wilson & Co. v. United States, U. S. S. C., 38 S. Ct. 21.

35. **Extradition**—Duty of Governor.—Under Rev. St. § 5278 (Comp. St. 1916, § 10128), where defendant admitted that he was in Illinois at time of commission of alleged crimes, and that indictments were in form and certified as required by law, held, that it was the duty of the Governor of the state where he was found to have him arrested and delivered to the Illinois authorities.—Biddinger v. Commissioner of Police of City of New York, U. S. S. C., 38 S. Ct. 41.

36. **Fraudulent Conveyances**—Badge of Fraud.—That grantor and grantee are brothers and business associates is of itself no evidence of fraud, or intention to defraud, but merely casts a suspicion, removed by evidence that the transaction was otherwise bona fide.—Mustar v. McComb, S. D., 164 N. W. 975.

37.—**Creditors**.—Property held under fraudulent conveyance can be uncovered by grantor's creditor and payment of debt enforced out of it, debt having been established against grantor, his estate, or personal representative.—First Nat. Bank v. McDonough, Ariz., 168 Pac. 635.

38. **Guardian and Ward**—Desire of Parent.—Wishes of father, surviving parent of daughter, as to her religious training and environment, should not be disregarded in relation to guardianship or custody of child.—Harding v. Brown, Mass., 117 N. E. 638.

39. **Gifts**—Validity.—Delivery of certificate of stock without actual transfer, or written assignment or power to transfer, though accompanied with words of gift, does not constitute valid gift inter vivos.—Heyer v. Sullivan, N. J., 102 Atl. 248.

40. **Husband and Wife**—Separate Maintenance.—Equity, independent of a proceeding for divorce or separation and without statutory authorization, has jurisdiction to decree the wife separate maintenance.—Robertson v. Robertson, Minn., 164 N. W. 980.

41. **Insurance**—Change of Beneficiary.—Where a member in a fraternal insurance order gave written notice of change of beneficiary as required, but the death benefit was paid the original beneficiary, the rights of the substituted beneficiary cannot be defeated because the change was not made from failure of the officers of the local lodge to call attention to the change.—Grand Lodge K. P. of Oklahoma v. Moore, Okla., 168 Pac. 659.

42.—**Evidence**.—Jury held justified in finding that call on insurance assessment was made by the directors of the company, though they did not go over figures of the officers, who made up the assessment and vote specifically.—Hartford Life. Ins. Co. v. Barber, U. S. S. C., 38 S. Ct. 54.

43.—**Foreign Corporation**.—Under Shannon's Code Tenn. 1917, § 3292, subsec. 3, a foreign insurance company, which has appointed the insurance commissioner attorney to accept service of process, and withdrawn from the state, may be sued, with service on the commissioner, in a county other than that of the commissioner's office.—Southern Paving Const. Co. v. City of Knoxville, Tenn., 245 Fed. 421.

44.—**Ignorance of Law**.—Member's Ignorance of by-laws of a fraternal insurer does not entitle him to recover premiums paid while engaged in an occupation prohibited by by-laws and collected by insurer without knowledge that member was so engaged.—Pope v. Royal Highlanders, Neb., 164 N. W. 1047.

45.—**Liability Policy**.—An insurer in an employer's liability policy, having once assumed the defense in an employee's suit, cannot relieve itself of liability to pay the judgment by an unwarranted withdrawal from the case.—Standard Printing Co. v. Fidelity & Deposit Co. of Maryland, Minn., 164 N. W. 1022.

46.—**Pledge**.—Despite prior written assignments, held, that delivery of policies by insured to his sister, for her own benefit and as trustee for his wife, amounted to valid pledge.—In re Baird, U. S. D. C., 245 Fed. 504.

47.—**Sick Benefit**.—Contract allowing benefits to a member of society "who is sick and unable to work" does not apply to natural illness following breaking of leg.—Beaudoin v. La Societe St. Jean Baptiste de Bienfaisance de Biddeford, Me., 102 Atl. 234.

48. **Internal Revenue**—Alimony.—Alimony paid to a divorced wife is not income, taxable under Act Oct. 3, 1913, § 2a, subd. 1, and section 2b.—Gould v. Gould, U. S. S. C., 38 S. Ct. 53.

49. **Intoxicating Liquors**—Local Option.—Where statute providing for submission of question of local option and directing that election officials should be appointed from lists submitted by committees in charge of campaigns for and against license makes no provision for choosing or appointing committees, but parties favoring and opposing license have long been in existence, appointments made from lists presented by committees claiming to represent such parties are valid.—Fouracre v. White, Del., 102 Atl. 186.

50. **Judgment**—Foreign Judgment.—In action on foreign judgment, court's jurisdiction over defendant may be inquired into; but such inquiry involves all the usual tests for determining such jurisdiction.—Westwater v. Murray, U. S. C. C. A., 245 Fed. 427.

51. **Landlord and Tenant**—Estoppel.—Lessee taking and holding possession until action of unlawful detainer was brought held estopped to repudiate lease for uncertainty of the description of premises.—Merchants' Nat. Bank of San Francisco v. Weston, Cal., 168 Pac. 587.

52.—**Option to Renew**.—A lease providing for option of renewal for six months at monthly rental, payable in advance creates tenancy for six months if tenant exercises option.—Moore v. Denver Pub. Co. Col., 168 Pac. 650.

53. **Licenses**—Trading Stamps.—Objection to trading stamps on public grounds is not so obviously unreasonable as to warrant court holding invalid statute imposing license tax.—State v. Wilson, Kan., 168 Pac. 679.

54. **Mandamus**—Quo Warranto.—Mandamus is remedy whereby county jail physician may compel county commissioners to fix pay for services as jail physician, he having no remedy by action, quo warranto, or certiorari.—Sawyer v. Commissioners of Androscoggin County, Me., 102 Atl. 226.

55.—**Statutory Construction.**—Refunding Act of 1878, as to levy and collection of taxes by circuit court or judge when county court fails in its duty, having been held void by Kentucky decisions, it does not afford a remedy which will prevent mandamus to compel levy by county court.—*Hendrickson v. Apperson*, U. S. S. C., 38 S. Ct. 44.

56. **Master and Servant**—Assumption of Risk.—An employe, hired to operate and take care of a delivery truck, which he tested from time to time, and whose testimony disclosed that he knew of the defect in the emergency brake, assumed the risk of injury by the truck starting without warning, owing to the slipping of the brake.—*Pierce v. Morrill Bros. Co.*, Me., 102 Atl. 230.

57.—**Course of Employment.**—A messenger boy, who while on duty climbed a passing vehicle to expedite his work, departed from the scope of his employment, so that an injury while on such vehicle did not arise out of and in the course of his employment under the Workmen's Compensation Act.—*State v. District Court, Hennepin County, Minn.*, 164 N. W. 1012.

58.—**Joinder as Defendants.**—A joint action cannot be maintained against a master and servant for an injury and death occurring in Ohio, where the master's liability arises solely under the doctrine of respondeat superior.—*Robbins v. Pennsylvania Co.*, U. S. C. C. A., 246 Fed. 435.

59.—**Res Ipsa Loquitur.**—It cannot be assumed, without evidence, in action for death of employe, who fell down elevator shaft, that ascent of the car from the six to the seventh floor, during absence of operator, was without direction, as evidence of defect; res ipsa loquitur doctrine not applying.—*West v. Woman's Hospital in State of New York*, N. Y., 167 N. Y. S. 220.

60.—**Respondeat Superior.**—That master permitted chauffeur to take automobile to go home at night held not to sustain jury finding that chauffeur was in prosecution of master's business at time of collision that evening.—*Gewanski v. Ellsworth*, Wis., 164 N. W. 996.

61.—**Safety Appliance.**—Where electric company fails to furnish employe with safety appliance in general use, the employe, not knowing of its existence, does not, as matter of law, assume dangers which their use would have obviated.—*Donnelly v. Lehigh Nav. Electric Co.*, Pa., 102 Atl. 219.

62.—**Warning.**—Where the injured servant told the foreman of the master that he had sawed many cords of wood and understood saws, he could not recover on the theory that the foreman had failed to warn and instruct him as to defects in the saw which were open and obvious.—*Evans v. Harper & Googin Co.*, Me., 102 Atl. 225.

63.—**Workmen's Compensation Act.**—Where plaintiff's employer and defendant street railway company were both under Workmen's Compensation Act (Gen. St. 1913, §§ 8195-8230) when plaintiff was injured, defense that plaintiff's sole remedy was under the act is not established, where he was not injured on the premises or during hours of service as required by section 8230, subd. "l."—*Otto v. Duluth St. Ry. Co.*, Minn., 164 N. W. 1020.

64. **Mines and Minerals**—Lease.—Where lease of oil and gas lands required lessee to drill one good well to preserve rights as lessee, which he did, he or his assigns continuing to operate well, paying lessor her royalty, it was duty of lessor to notify lessee she required further development before she could insist upon forfeiture for lessor's failure to comply.—*Dinsmoor v. Combs*, Ky., 198 S. W. 58.

65. **Municipal Corporations**—Appointment to Office.—Any person elected or appointed to office under city charter is presumed to accept same with condition that his tenure may be terminated at any time in manner prescribed in such charter.—*Baines v. Zemansky*, Cal., 168 Pac. 666.

66.—**Contributory Negligence.**—Plaintiff, who was injured by defendant's automobile approaching at high speed, was not guilty of contributory negligence as matter of law because, though headlight was plainly visible, he failed to see it on looking in direction whence automobile came before he stepped off sidewalk.—*Klokow v. Harbaugh*, Wis., 164 N. W. 999.

67.—**Instructions.**—Allegations that defendants "so carelessly and negligently drove and managed the horses and vehicle" as to strike and injure plaintiff raised issues warranting instructions as to duty to "observe" persons crossing street and "to use ordinary care to avoid" injury.—*Cooper v. Kelly*, Ark., 198 S. W. 94.

68.—**Instructions.**—In action against garage company by husband and wife for injuries to wife when she tripped over rope with which company was towing automobile on street, it was error to instruct that extending of rope between two cars placed burden on company to warn others of obstruction.—*Steinberger v. California Electric Garage Co.*, Cal., 168 Pac. 570.

69.—**Negligence.**—Where the city built a sewer and inlet and negligently allowed it to become choked and so to remain for over four months, so that it caused an overflow with damage to abutting property, it was liable for such damages.—*Geiger v. City of St. Joseph*, Mo., 198 S. W. 78.

70.—**Ordinance.**—Municipal ordinance forbidding person from occupying house in a block upon which a greater number of houses are occupied by persons of the opposite race held invalid.—*Buchanan v. Warley*, U. S. S. C., 38 S. Ct. 16.

71. **Navigable Waters**—Soil in.—That sand in river bed is liable to be shifted held not to change its character while at rest, as respects right of state to make charge for taking sand.—*Wear v. State of Kansas ex rel. Brewster*, U. S. S. C., 38 S. Ct. 55.

72. **Negligence**—Imputability.—Where it does not appear that passenger in wagon was in any respect responsible for acts of driver, driver's negligence in going upon interurban railroad's crossing cannot be imputed to passenger unless it was sole cause of injury.—*Southern Traction Co. v. Owens*, 198 S. W. 150.

73. **Partnership**—Non-Trading Firm.—In action on note signed by firm name by partner, instruction that if partnership existed, and its principal business was earning commissions by dealing in land, there could be no recovery, was properly refused as eliminating possibility of finding that partner who did not sign authorized use of name of nontrading firm.—*Chumbley v. Courtney*, Ia., 164 N. W. 945.

74. **Perjury**—Good Faith.—A man, honestly mistaken as to the existence of a fact which he affirms to exist under oath, is not guilty of perjury merely because the fact was other than as stated by him under oath.—*State v. Lazarus*, Ia., 164 N. W. 1037.

75. **Principal and Agent**—Sub-Agents.—Where automobile manufacturer intending to deal direct with subagents relieved dealers of receiving and paying for cars ordered by the subagent, held, that it could not defeat claim for commissions because they were not received and paid for.—*Fixlee v. Buick Motor Co.*, Mo., 198 S. W. 86.

76. **Railroads**—Contributory Negligence.—In action for injuries at crossing, that telegraph poles obscured vision at one point did not absolve plaintiff of contributory negligence in

driving upon track when for 30 feet before he went on track his vision was unobscured.—*Jones v. Southern Pac. Co., Cal.*, 168 Pac. 586.

77. **Release**.—Construction of Writing.—That terms of release executed by plaintiff's general guardian pursuant to order of probate court were broad enough to cover any claim guardian might have had individually held to give rise to no inference that payment for which release was given was for other purpose than compliance with terms of compromise sanctioned by court, or that guardian received any part individually.—*Swartz v. Filippello, Cal.*, 168 Pac. 574.

78. **Religious Societies**.—Trust Impressed.—Where congregation was incorporated and acquired property to maintain place of worship according to doctrine of United Greek Catholic Church, it was impressed with a trust for such purpose, so that members adhering thereto were entitled to injunction against members following another doctrine.—*Kicinko v. Petruska, Pa.*, 102 Atl. 286.

79. **Sales**.—Acceptance.—Memorandum that plaintiff would take team, allowing \$300 on contract for artesian well, contemplated transfer at time performance was due on plaintiff's part, and if at such time team was not sound as represented, plaintiff was not obliged to accept.—*Norbeck & Nicholson Co. v. Nielsen, S. D.*, 164 N. W. 1033.

80. —Contract.—A contract to sell 500 head more or less of cattle, including "all cattle with the 14 on left loin and hip and LEC on left side from shoulder to hip," did not include cattle branded only with one or the other brand.—*Valentine v. Shepherd, Ariz.*, 168 Pac. 643.

81. —Fixtures.—Provision of contract of brewer for furnishing fixtures to saloonkeeper, that if he cease buying beer of it he shall buy the fixtures of it "at cost price less * * * 10 per cent per year for depreciation," means 10 per cent each year from original cost price.—*Kansas City Breweries Co. v. Ratzel, Mo.*, 198 S. W. 84.

82. —Rescission.—It is fraud, warranting rescission by buyer, for seller of mule, knowing that it has a latent disease, heaves, not discovered by trial made, or known to buyer, to keep quiet and not disclose the defect.—*Salmonson v. Horswill, S. D.*, 164 N. W. 973.

83. —Reservation of Title.—Seller of goods, reserving title, to corporation which became insolvent, by filing purchase-money notes with company's receiver for allowance waived any right to reclaim property and to have its claim allowed as preferred claim, machinery having been sold by receiver.—*Gordon Hollow Blast Crate Co. v. Zearing, Ark.*, 198 S. W. 97.

84. —Removal After Rejection.—Where a railroad company inspected ties placed on its right of way and notified plaintiff of rejection, subsequent removal of ties by one unknown creates no presumption against company.—*Atlantic Coast Line R. Co. v. Drake, Ga.*, 94 S. E. 65.

85. **Specific Performance**.—Evidence.—Where E, under bond for deed from C, had continuous possession till his death, and thereafter, but before decree in E's estate awarding land to plaintiff, C deeded to J, and J to G, both knowing of such possession, held, title would be decreed in plaintiff, on paying taxes paid by J and G, and amount due under contract, without G accounting for value of use.—*Phillis v. Gross, S. D.*, 164 N. W. 971.

86. **Street Railroads**.—Estoppel.—Trustee for bondholders of electric railway company, held not estopped from foreclosing mortgage because they had induced bondholders of street railway company, in consideration of a merger, to consent to a reduction of its bonded indebtedness.—*Columbia & Montour Electric Co. v. North Branch Transit Co., Pa.*, 102 Atl. 214.

87. —Last Chance Rule.—That a driver of a wagon was on the opposite side from a coming street car, and could not possibly be seen by the motorman, would not bar recovery, under the last chance rule, for the death of such driver as a direct result of the collision, even

though the motorman did not anticipate such result.—*Bybee v. Dunham, Mo.*, 198 S. W. 190.

88. **Taxation**.—Non-Resident.—Deposits in bank in Missouri, owned by resident of Kentucky, held taxable at the owner's domicile, even though also taxable in Missouri, and whether tax was on the property or on the person.—*Fidelity & Columbia Trust Co. v. City of Louisville, Ky., U. S. S. C.*, 38 St. Ct. 40.

89. **Trusts**.—Termination.—Where surviving life tenants, under a trust, conveyed their interest to remainderman, a charity, the purpose to protect corpus pending life interests having been accomplished, the trust would be declared terminated on petition of remainderman.—*In re Stafford's Estate, Pa.*, 102 Atl. 222.

90. **War**.—Alien Enemy.—An alien enemy, resident in the enemy's country, cannot, during the war, prosecute an action in the courts of this country.—*Rothbath v. Herzfeld, N. Y.*, 167 N. Y. S. 199.

91. —Alien Enemy.—Money in hands of an administrator, belonging to alien enemy will be held, to be paid to the alien at end of war, or in the meantime to the constituted authority of the United States entitled to receive it.—*In re Kelly, N. Y.*, 167 N. Y. S. 256.

92. **Waters and Water Courses**.—Riparian Rights.—The meander of a body of water or lake in a survey of the public domain excludes its area therefrom, and it becomes subject to the riparian rights of the abutting owners in accordance with state laws.—*Lee Wilson & Co. v. United States U. S. S. C.*, 38 S. Ct. 21.

93. —Wrongful Diversion.—That a complainant, by diverting water from a stream, deprived defendant of water which it had a prior right to appropriate, held no defense to a suit to enjoin defendant from opening the ditch and taking water therefrom.—*Bader Gold Mining Co. v. Oro Electric Corp., U. S. C. C. A.*, 245 Fed. 449.

94. **Will**.—Ademption.—Under will bequeathing proceeds of life insurance policies for education of daughter, held, where testator procured cash surrender value of policies, investing proceeds in real estate, there was "ademption" of bequest to daughter.—*American Trust & Banking Co. v. Balfour, Tenn.*, 198 S. W. 70.

95. —Burden of Proof.—Fact that husband wrote will of his wife, in which he was sole beneficiary, did not cast upon him burden of disproving undue influence, as it would have done in the case of stranger.—*In re Spence's Estate, Pa.*, 102 Atl. 212.

96. —Contest.—In will contest, court properly instructed that jury could consider use of intoxicating liquors by testator for purpose of determining whether he had mental capacity to make will.—*Ravenscroft v. Stull, Ill.*, 117 N. E. 602.

97. —Contract.—Promise to leave property in return for support of services need not specify how title is to pass, it being sufficient if agreement is shown that promisee shall receive property, or that it shall be left to him at promisor's death.—*Velikanje v. Dickman, Wash.*, 168 Pac. 465.

98. —Estate Tail.—A will bequeathing to a daughter four-tenths of all real estate and personalty, and, in the event of the devisee dying unmarried, without issue, such part of the estate to go to others to have and to hold to them, their heirs, executors, administrators, and assigns forever, created an estate tail in the original donee.—*Skolfield v. Litchfield, Me.*, 102 Atl. 240.

99. —Intent of Testator.—A clause in a will declaring "that all my estate is community property. * * * Realizing that she is entitled to a full one-half of all of said estate, I intentionally make no further provision for her"—shows intention to give testator's wife half the estate whether community property or not.—*In re Hartenbower's Estate, Cal.*, 168 Pac. 560.

100. —Life Estate.—Under will giving testator's wife, if living at his death, the entire life income of residue of his estate, except certain bequests, and the remainder in trust to pay legacies, the equitable remainders became operative at her death.—*Layford v. McFetridge, Mass.*, 117 N. E. 589.

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RIGHT OF A LABOR UNION TO INDUCE ITS MEMBERS TO COMPEL AN EMPLOYER TO UNIONIZE HIS BUSINESS.

The decision of the Fourth Circuit Court of Appeals dismissing a bill by a mine owner to restrain certain officers of a labor union from persuading laborers to join the Union and thereby bring about a strike at its mine, where such laborers had agreed as a condition of employment that they would not join, was reversed by U. S. Supreme Court, notwithstanding the fact that the contracts between such mine owner and such laborers were terminable at will. There was dissent by Justice Brandeis, concurred in by Justices Holmes and Clark. *Hitchman Coal & Coke Co. v. Mitchell*, 38 Sup. Ct. 65.

The prevailing opinion by Justice Pitney says the fact that this is a contract terminable at will "does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion." But how may this be pertinent in a suit between the employer and a third person? This was not a case where the employee was complaining.

The court, however, further says: "Plaintiff (the mine owner) was and is entitled to the good will of its employees, precisely as a merchant is entitled to the good will of his customers, although they are under no obligations to deal with him. The value of the relation lies in the reasonable probability that by properly treating its employees and paying them fair

wages and avoiding reasonable grounds of complaint, it will be able to retain them in its employ and to fill vacancies occurring from time to time by the employment of other men upon the same terms. The pecuniary value of such seasonable probabilities is incalculably great and is recognized by the law in a variety of relations."

This is quite a novel application of the doctrine of property right in good will, and appears to suggest a difference in businesses long established and those newly begun. But it is not very apparent how a new business might be differentiated as far as employment of labor is concerned as easily it is differentiated with regard to custom. Custom must be proved to be valuable, stable, easily to be estimated. It must present a basis for expectation of continuance. About the only thing any business—and one as well as another—could show was that it was so circumstanced that it would exist in the future for an appreciable time.

Passing on we find this opinion referring to one having a right of action against another for persuading an employee to quit a service he is engaged in and to the fact that these officers were not the agents of employees to bring about any such situation as they were aiming at. It was said: "The right of employees to strike would not give to defendants the right to instigate a strike. The difference is fundamental."

The opinion concedes that the good faith of those officers is to be taken into account, but where the damage threatened is irremediable, and a ruling "as in this case upon an assertion of conflicting rights that are sought to be attained by unfair methods, and for the very purpose of interfering with plaintiff's rights, of which defendants have full notice," it will not be controlling. This does not sound very positive. It does not grip one as a principle.

But the court speaks more emphatically in saying that: "Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence. In our opinion any violation of plaintiff's legal rights continued by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employes constitutes such violation."

As a general principle this is true, but if by statute or general policy of law, the right of labor unions to bring about a strike by peaceable means is deemed lawful, why should not all such contracts as are spoken of be deemed to have been made subject to police power as to their validity?

Justice Brandeis, in his dissent, appears to take this view of the matter, taking the position that this is especially true as respects contracts terminable at will. At all events, it seems that legislation giving labor unions the right to organize for their own benefit and incidentally to canvass for members does not include the right to act in a way counter to the legal rights of another. But the decision does not dispose of any specific grant of right to a labor union to accomplish such a result as was being aimed at. Whether such legislation would be valid under the Fourteenth Amendment is another question. Would it be lawful under a state's police power? This power embraces situations far beyond what formerly were not considered within its reach. And then, we repeat, that the doctrine announced as to good will is quite an advance so far as property therein is concerned. There cannot be shown any predicate as understood at common law, to base violation of recognized right. In other words, there is speculation, pure and simple.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—PROVISION AS TO STYLE OF PROCESS BEING MANDATORY ON DIRECTORY.—Section 38 of Article 6 of the Constitution of Missouri provides that : "All writs and process shall run * * * in the name of the State of Missouri," and in an order of publication to a non-resident defendant there was special appearance for her and objection made that the notice of publication not so running conferred no jurisdiction upon the court. This objection was overruled by the Circuit Court and this ruling was affirmed by Missouri Supreme Court, *Creason v. Yardley*, 198 S. W. 830.

The court affirmed an opinion by its commissioner upon the ground that the notice gave precisely the same information that would have been given had it have run in the name of the State of Missouri. Therefore this constitutional provision must be deemed directory. It was said: "We are of the opinion that, if said order of publication had contained all the alleged requirements pointed out by appellant, it would have afforded no more practical information than that contained in the order of publication as made."

This argumentation seems to us faulty for a variety of reasons, one or two of which may be mentioned.

In the first place it seems quite a long step to say that a positive direction in fundamental law may be deemed directory. This, as we understand, means that it may be observed or disregarded just as one pleases. Here there was no pretense of an attempt at compliance.

In the second place, if the provision should have force in any writ, this ought to be in a case where the writ is not to be personally served. Certainly one being under duty to take notice of whatsoever writ may affect his property in the jurisdiction, is not bound to read a published writ that does not "run" as the state Constitution requires that it should run. Otherwise it does not purport properly to emanate from an officer presumptively authorized to issue it. If an absentee is enjoined by law that his rights may be affected, may he be not excused from reading a writ which a fundamental law requires to be directed in a certain way?

It may be difficult to say what purpose Missouri Constitution had in this positive requirement and we may concede that if a writ not running as required is personally served, ap-

pearance would waive nonobservance of the requirement, but to declare it directory in all cases is equivalent to saying it is of no special importance.

But how lightly a constitution may be set at naught, this case points an instance. Is the word "directory" a word of camouflage, that is to say wholly misapplied when the eye of a court is seeking substance rather than shadow?

MUNICIPAL CORPORATIONS — ORDINANCE REGULATING HEIGHT OF BUILDINGS.—In *State ex rel. Sale v. Stahlman*, 94 S. E. 497, decided by West Virginia Supreme Court of Appeals, peremptory writ of mandamus was granted against the mayor of a city to grant a permit to erect a one-story building.

In answer to application for the writ it was claimed that power was given to the city to "regulate the height, construction and inspection of all new buildings," and that permit had been refused relator to erect a building on his lot to be a one-story structure, when the adjoining lots had on them buildings three stories high. This lot being on one of the city's principal thoroughfares the policy of the city was to this end.

Conceding, as the court does, that in the interest of public safety a city may restrict the height of buildings, it is denied that it may compel a builder to build up to a restricted height. The court said:

"Artistic, civic, and economic views of a one story building between three or four story buildings in a section in which, as a rule, only the higher structures are put up, severely condemn it, but certain obvious laws of physics effectually exclude the assumption that it is substantially conducive to danger from fire. Of course, an open fire between tall buildings may be more dangerous, in the absence of resistance, than a smothered one; but a fire in a one story building would not be an open one. It would be subject to the restraining influence of the roof and walls, in a manner similar to that exerted by the walls, floors, and roof of a higher structure. Besides, a low building is more accessible to firemen than a high one. The combustible matter on which the fire feeds is all near the ground and within easy reach. Water may be poured directly upon it from the windows and roofs of the adjacent and neighboring buildings. Its low altitude decreases the danger to firemen and facilitates their work. There is nothing by which the fire can spread directly upward, the direction in which it runs most rapidly, and the volume of combustible matter is smaller than that of a higher building. Any slight tendency of a one story building situated between higher ones to danger by fire is manifestly outweighed and re-

duced to nothing by these obvious and commonly known factors and principles."

This ruling proceeds upon the idea that there can be no reasonable classification for the exercise of police power in such a requirement as the city sought to make. It may be, however, that some theory might show that public safety would be advanced by having buildings of uniform height, but it would be difficult to discern them. The burden was on the city to show reasonable classification under police power. The "artistic, civic and economic" theory was well declared not to warrant classification.

CONSTITUTIONAL LAW—INQUIRY INTO SHIPMENT OF LIQUOR FOR PERSONAL USE.—In *Seaboard A. L. Ry. v. North Carolina*, 38 Sup. Ct. 96, it appears that a railroad was convicted for refusing to allow inspection by a private person of record of shipments of intoxicating liquor under a statute requiring such record to be kept with consignees to sign on receipt of shipment, it being provided that said book be open for inspection by any officer or citizen of the state. There was a special verdict showing that a citizen sought inspection of such record, when he was not an officer and acted under no legal process, and was denied the right of inspection. It was also recited that the citizen was seeking general information, having in his mind specially to see who were consignees "for the purpose of prosecuting such as may be charged or suspected with the violation of the prohibition laws of the state." In this verdict the court found the railroad guilty, and this decision was affirmed by the federal Supreme Court.

This statute was passed under authority of the Webb-Kenyon law, and the railroad claimed that compliance with the state statute would necessarily violate § 15 of the Commerce Act which forbade disclosure to other than shippers and consignees anything to the prejudice of the latter to one not acting by virtue of legal process.

The court first alludes to decision upholding the Webb-Kenyon law, declaring its purpose to be to prevent any "subterfuge and indirection" to set state laws regarding liquor shipments at naught. Then it was said: "Plainly, therefore, after that enactment nothing in the laws or Constitution of the United States restricted North Carolina's power to make shipment of intoxicants into Wake County a penal offense, irrespective of any personal right in a consignee there to have and consume liquor of that character. The challenged act, instead of interposing an absolute bar against all such

shipments as it was within the power of the state to do, in effect permitted them upon conditions intended to secure publicity, to the end that public policy might not be set at naught by subterfuge and indirection. The greater power includes the less."

It seems to us that, while police power may, in some circumstances, be a greater power than personal right, yet where the latter is absolute it ought not to be thought to be less than the former, if it is being exercised in a wholly unexceptionable way. There is nothing exceptional in an ordinary shipment whereby a consignee obtains title to goods shipped. It becomes exceptionable, if at all, by some ulterior design aimed, not at him, but at others with whom he has no contractual or other relations. To say that subterfuge practiced by them gives a right against him, or even puts any burden of proof on him, under the claim of useful publicity, is offering a basis for the exertion of police power that is far-reaching."

THE TWENTY-EIGHT-HOUR LAW AS CONSTRUED IN PENAL ACTIONS.—PART II.*

Connecting Carriers.—The courts are divided in their construction of the law as applied to movement of live stock over the lines of connecting carriers. The weight of authority, and as it seems to the writer, of reason also, is that the law penalizes the continuance of the confinement of the animals after they have already been confined the period of time permitted by the statute. The offense is not that the defendant itself confined the stock for a longer period than the authorized time, but that it continued to confine stock which had already been confined (whether by it or preceding carriers) as long as the law permits. Under this view if a carrier accepts from a preceding line a shipment on which the time limit has already expired it violates the law, and if its act is done knowingly and willfully it is liable for the

penalty.³⁵ It is no defense that the preceding line has been fined for its violation since each carrier is separately guilty for having in its possession, without legal excuse, overconfined stock.³⁶ The other line of authorities proceeds upon the theory that one violation occurs when the time limit expires and the carrier in whose possession the stock were at that time is guilty, and that the time necessarily counted against the first carrier cannot be again counted against the connecting line. Under this view a minimum time of 28 or 36 hours as the case may be, is required for the commission of each offense.³⁷ Under this rule a carrier which receives a car of stock which has already been over-confined is not liable unless a second time limit expires while the shipment is in its possession. If it can pass the car on to the next carrier before that occurs it escapes altogether.³⁸ These authorities hold that the imposition of a penalty satisfies the law for the period necessarily counted to make the first violation and therefore such period cannot be counted again against the same or another carrier.

It is established, however, by the great weight of authority that where a connecting line or terminal company accepts a shipment already over-confined from the preceding carrier, for the purpose of carrying it to its pens, convenient to the

(35) U. S. v. Oregon Short Line (Ida.), 160 Fed. 526; Grand Tr. Ry. Co. of Canada v. U. S. (N. Y.), 191 Fed. 803; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 156 Fed. 249.

(36) U. S. v. Wabash R. Co. (Mo.), 182 Fed. 802; U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 221 Fed. 1000; U. S. v. Nor. Pac. Term. Co. (Ore.), 181 Fed. 879; N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

(37) U. S. v. Louisville & N. R. Co. (Tenn.), 18 Fed. 480; U. S. v. Sioux City Stock Yards (Ia.), 162 Fed. 556.

(38) U. S. v. Chicago, M. & St. P. Ry. Co. (Ia.), 234 Fed. 386 (holding defendant must itself have kept stock in confinement more than statutory period); U. S. v. Stockyard Term. Co. (Minn.), 172 Fed. 452 (does not decide whether second period would begin to run when defendant received the shipment, or from expiration of first).

*Part I appeared in last week's issue, page 23.

junction, for unloading, feed and water, it does not thereby necessarily render itself liable to the penalty since such action is in aid of the humane purpose of the law. These decisions rest on the ground, not always specifically expressed, that the carrier's act was not done knowingly and willfully. But to avoid liability the carrier must transport the stock to the pens and unload them without unreasonable delay.³⁹ Where the time consumed substantially exceeds the usual running time to the pens the burden is on the carrier to show due diligence to unload promptly. Thus where the usual running time was 1 hour and 5 minutes it was held that the defendant did not sufficiently excuse itself for taking two hours and a half to unload the stock, by merely showing that the temperature was very cold and that the route lay through a busy part of the railroad yards.⁴⁰ The defendant must show *facts* from which the court can find that the time used was not unreasonable. The testimony of two conductors that the movement was reasonably prompt is not sufficient to satisfactorily explain why three hours and thirty-five minutes should be necessary to carry a car of stock seven miles and unload them; such movement is *prima facie* too slow.⁴¹ In another case where the running time to the pens was about one hour, but the carrier failed to unload the stock for four hours and forty minutes, the court held that the burden was on the carrier to show that the delay was caused by storm, accident or other excepted cause.⁴² It makes no difference that defendant is a link in the through route and carried the

shipment in the direction of its destination.⁴³

A few courts do not admit the soundness of the argument that a carrier may excuse itself for continuing the overconfinement on the ground that it does so solely for the purpose of unloading the stock as promptly as possible. They hold that the connecting line is under no obligation to accept a shipment on which the limit has expired, and take the view that the enforcement of the law will be better subserved if connecting lines refuse to receive shipments in such cases.⁴⁴ It is immaterial under this view that the defendant unloaded the animals as promptly as possible.

A carrier which delivers the shipment to the next line within the time limit is not guilty⁴⁵ unless such connecting line is a mere agency of the first line and not an independent carrier.⁴⁶

The question of the connecting line's knowledge that the stock had been already overconfined when received by it will be considered when we come to the discussion of the words "knowingly and willfully" in the statute.

Storm or Other Accidental Causes, Etc.
—The carrier does not violate the law by confining the stock beyond the statutory period where it is prevented from unloading them "by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight." Defense under this exception must be pleaded and proved by the defendant. The Government need not allege in the complaint that the overconfinement was not caused by storm or

(39) U. S. v. Lehigh Val. R. Co. (N. Y.), 184 Fed. 971; Nor Pac. Term. Co. v. U. S. (Ore.), 184 Fed. 602 (1300 feet to pens); U. S. v. Stockyards Term. Co. (Minn.), 178 Fed. 19 (11 miles to pens).

(40) U. S. v. Delaware L. & W. R. Co. (N. Y.), 220 Fed. 944.

(41) N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

(42) U. S. v. Delaware, L. & W. R. Co. (N. Y.), 206 Fed. 518.

(43) St. Louis Merchants' Bridge & Trans. Co. v. U. S. (Ill.), 209 Fed. 60. (Eastbound shipments received in St. Louis and carried to pens in East St. Louis, Ill.)

(44) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947; U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625.

(45) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459.

(46) U. S. v. Union Pac. R. Co. (Utah), 213 Fed. 332, 181 Fed. 625.

accident.⁴⁷ It is held that an accident such as will excuse the carrier under this provision is "one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of everyone under the circumstances of the particular case; that is, such care and caution as would have been exercised by a man of ordinary prudence in the circumstances of the particular case; it does not include an accident caused by the negligence of the carrier, nor press of business, nor the side tracking of the train to allow passenger and fast freight trains to pass if such meetings were known or anticipated when the movement began."⁴⁸ The carrier must show that the breakdown or wreck relied on as an excuse did not result from a cause that due diligence and foresight would have anticipated and avoided.⁴⁹ It must be a cause "which reasonably prudent and cautious men under like circumstances do not and would not ordinarily anticipate and whose effects under similar circumstances they do not and would not ordinarily avoid."⁵⁰ Let us see the application made of these principles by the courts to the facts of particular cases. In the case last cited a train of sheep was inspected before leaving a feeding station and nothing found wrong. It had enough time to reach the next feeding station within the time limit and before dark. Delay occurred, however, due to an unusual series of accidents; first on account of the breaking of a drawbar on another train on the road. A chain was substituted in place of the drawbar but this also broke. Further delays were caused by the breaking of a coupler and two drawbars on the sheep train, with the result that the train did not reach the un-

(47) U. S. v. Oregon Short Line (Ida.), 160 Fed. 526; N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833.

(48) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459.

(49) U. S. v. Atchison, T. & S. F. Ry. Co. 194 Fed. 342.

(50) Chicago, B. & Q. R. Co. v. U. S. (Neb.), (Ill.), 166 Fed. 160.

loading station until after dark, but within the time limit. The sheep were dragged out of two cars in the dark before the time limit expired. The men then became exhausted and allowed the rest of the sheep to stay in the cars all night. The carrier was held not guilty.

A car of stock reached a point sixteen miles from destination with four hours' margin. A drawbar pulled out necessitating the calling of a wrecking train. Later an air hose burst, these two accidents causing a delay of three hours and twenty minutes. The car was not unloaded until two hours and seventeen minutes after the time limit had expired.

In other words the carrier consumed nearly three hours, after deducting the accidental delays, in carrying the stock sixteen miles and unloading them. The court held that this was sufficient evidence to sustain a verdict of guilty since the jury may have found that the defendant did not use due diligence after the delays occurred. There was also room for the jury to find that a delay of about an hour and a half in calling for the wrecking train was negligent.⁵¹

In a recent case the court seems to draw a distinction between accidents, such as wrecks, which are practically (though not strictly) *vis major*, and congestion of traffic, holding the former to be covered by the exception, but not the latter.⁵²

In another case the court left open the question whether a great and unusual press of business may not under some circumstances excuse the carrier, but held that a mere allegation in the answer that the overconfinement was due to such cause, unexplained and of itself, does not state a good defense.⁵³

(51) Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 268.

(52) U. S. v. Phila. & R. Ry. Co. (Pa.), 238 Fed. 428.

(53) U. S. v. Union Pac. R. Co. (Wyo.), 169 Fed. 65.

Under the old law, which excused the carrier where the unloading was prevented "by storm or other accidental cause" it was held that "other accidental cause" meant other unavoidable cause like a storm, and did not embrace accidents resulting from carrier's negligence.⁵⁴

There are cases where weather conditions interfered with the unloading of the stock, but these cases will be discussed under the caption "knowingly and willfully," as they seem properly to belong under that head.⁵⁵

Knowingly and Willfully.—While every confinement of stock in cars beyond the twenty-eight or thirty-six hour period, as the case may be, is, in the absence of legal excuse, a violation of the law, it does not follow that the carrier is always liable for the penalty. The penalty is imposed only where the carrier knowingly and willfully fails to comply with the law. There is much confusion in the cases as to just what these words mean. A minority of the courts hold that if a carrier fails to comply with the law with full knowledge of the facts its action is willful.⁵⁶ These courts say that willfully only means without lawful excuse, or the intentional doing of the act forbidden.⁵⁷ The trouble with this view is that it practically deprives "willful" of any meaning in the law at all. Its effect is to hold a carrier guilty for receiving a shipment on which the time period has elapsed, for the purpose of unloading the animals, even where its refusal to receive them would greatly delay their release from the cars. We have seen that the majority of the decisions hold the car-

rier not liable in such a case provided it handles the shipment promptly.

The following language taken from the opinion in St. Louis & S. F. Ry. Co. v. U. S.,⁵⁸ expresses the prevailing view and has been much cited:

"'Knowingly' evidently means with a knowledge of the facts which taken together constitute the failure to comply with the statute, as in the case where one carrier received a car loaded with cattle, and, with knowledge of how long they had been confined in the car without rest, water, or food, prolongs the confinement until the statutory limit is exceeded."

And the same court declares that "willfully" "means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements."⁵⁹ It does not mean with evil intent or a bad and malignant heart on the part of the defendant, or with intent to injure the stock.⁶⁰

Thus the carrier's failure to unload before expiration of the time limit may be done knowingly but not willfully, and, therefore, without incurring liability for penalty, as where defendant, which had provided itself with sufficient suitable pens for the reasonable accommodation of its traffic, was compelled on account of unexpected delays to unload a shipment into pens at an intermediate station which were not properly equipped. The court did not decide whether unloading into improper pens was a violation of the law, but held, granting that it was, that the defendant's action was not willful under the circumstances.⁶¹

(54) *Newport News & M. V. Co. v. U. S. (Ky.).* 61 Fed. 488.

(55) *U. S. v. Phila. & R. Ry. Co. (Pa.).* 223 Fed. 207; *U. S. v. Phila. & R. Ry. Co. (Pa.).* 223 Fed. 211.

(56) *U. S. v. Phila. & R. Ry. Co. (Pa.).* 238 Fed. 428.

(57) *Newport News & M. V. Co. v. U. S. (Ky.).* 61 Fed. 488; *U. S. v. Sou. Pac. Co. (Cal.).* 157 Fed. 459; *U. S. v. Union Pac. R. Co. (Wyo.).* 169 Fed. 65.

(58) (*Mo.*) 169 Fed. 69.

(59) *Chicago, B. & Q. R. Co. v. U. S. (Neb.).* 194 Fed. 342; *U. S. v. Stockyards Term. Co. (Minn.).* 178 Fed. 19; *St. Louis, M. B. & T. R. Co. v. U. S. (Ill.).* 209 Fed. 60; *N. Y. C. & H. R. R. Co. v. U. S. (Mass.).* 165 Fed. 833.

(60) *U. S. v. Atchison, T. & S. F. Ry. Co. (Ill.).* 166 Fed. 160; *Chicago & N. W. Ry. Co. v. U. S. (Ill.).* 234 Fed. 272.

(61) *St. Louis & S. F. Ry. Co. v. U. S. (Mo.).* 169 Fed. 69.

But where the stock are carried in patent cars designed to dispense with unloading under the statute, it has been held that if the carrier knowingly and willfully confines the stock more than twenty-eight hours without their being fed it is guilty even though it appeared that there was a caretaker in charge, who had undertaken to feed the stock and had provisions in the car.⁶² In such case it seems the carrier must see to it at its peril that the stock actually are properly fed and watered.

"Knowingly and willfully" is not synonymous with "negligently." In one case the court says:⁶³

"It is not possible to omit an act knowingly and willfully, unless the act be consciously in the mind; if it be no longer in the mind it cannot be within the range of either knowledge or intention."

For example, if an employee had learned from the waybill how long the stock had been confined, but his attention being diverted, had forgotten to unload them within the time limit, his omission would not be willful.⁶⁴ So where the failure to unload in time was due to a clerical error of one of defendant's employees which others negligently failed to discover, it was not a knowing and willful failure to observe the law.⁶⁵ It has been held, however, that an answer alleging that the failure to unload the stock in due time was caused solely by the oversight, forgetfulness, and unintentional neglect of defendant's train dispatcher in not notifying the station agent of the movement of the car, did not state a good defense, since the knowledge of defendant's employees is imputable to it;⁶⁶ and where an employee in violation of the rules of the company which employees were required to read and strictly observe,

(62) Chicago, B. & Q. R. Co. v. U. S. (Neb.), 195 Fed. 241.

(63) U. S. v. Lehigh Val. R. Co. (N. J.), 204 Fed. 705.

(64) U. S. v. Phila. & R. Ry. Co. (Pa.) 223 Fed. 213.

(65) Montana Cent. Ry. Co. v. U. S. (Mont.), 164 Fed. 400.

negligently failed to note a waybill and direct unloading of the car, it was held that the carrier was liable.⁶⁶

There is no uniformity among the court decisions as to the effect of a connecting carrier's ignorance of how long the stock had been confined when received by it. Some hold it must find out at its peril;⁶⁷ others that it is presumed to know how long they have been confined and to excuse itself on the ground of ignorance of the facts, it must show that it could not ascertain the facts by reasonable inquiry.⁶⁸ This is believed to be the sounder view; a third group seem to hold that if actual knowledge of the overconfinement is lacking the defendant cannot be liable even though it failed to make any inquiry.⁶⁹ The decisions where this view is expressed are cases where terminal carriers accepted stock on which the limit had expired, or was about to expire, for the purpose of switching to the pens for unloading, and did so promptly, and it is believed that the cases can be distinguished on the ground that the carrier would not have been required to refuse to handle the stock under the circumstances, if it had known how long they had been overconfined.

The views of the courts as to what acts constitute a knowing and willful violation are illustrated by the following digest of cases:

A terminal company which received a shipment on which the limit had expired for switching to the stockyards on its line for unloading was held guilty, although it handled the car as promptly as possible and did not know that the limit had been ex-

(66) U. S. v. Atlantic C. L. R. R. Co. (Va.), 163 Fed. 764.

(67) U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625; U. S. v. Sioux City Trans. Co. (Ia.), 234 Fed. 663.

(68) N. Y. C. & H. R. R. Co. v. U. S. (N. Y.), 203 Fed. 953.

(69) U. S. v. Chicago Jct. Ry. Co. (Ill.), 211 Fed. 724; St. Joseph Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

ceeded. The court said it was obliged to find out how long the stock had been confined at its peril.⁷⁰

Where defendant received a car of hogs from the preceding carrier two and a half hours before the time limit had expired, and two hours was a reasonable time within which it should have unloaded them, but failed to unload them until the time limit had been exceeded by more than an hour and a half, it was held guilty. It was no defense that the waybill was so indistinct that defendant's employees failed to discover the time of last loading noted thereon, nor that it was misled by the preceding carrier's having advised it by telephone that sixteen cars of sheep were coming on which the time limit was about to expire and had failed to mention the hogs which were moving in the same train.⁷¹

It has been held not to be a willful violation of the law for a connecting carrier to receive stock already confined beyond the limit, where the run destination is only seven miles, and the stock would otherwise have to be carried fifteen or twenty miles for unloading.⁷²

A shipment of livestock was delivered to defendant terminal company on which the time limit had expired. Defendant did not know how long the stock had been confined on account of the waybill not having been received until later. It switched the cars to its pens and unloaded them with reasonable despatch, but not with the usual speed due to an unusual number of cars being received at once. The court held that it was not guilty of knowingly and willfully violating the law, and pointed out that it would not have helped any for defendant to have inquired how long the stock had been confined since its pens

were in any event the most convenient into which they could have been unloaded.⁷³

Defendant, a switching line and stockyards company, received four cars of stock from a connection. Three of the loads had already been in the cars overtime and the limit was nearly up on the fourth. Defendant did not know how long the shipments had been confined and made no inquiry. It hauled the cars to its pens and unloaded them with due diligence and promptness, consuming two and a half hours in the operation. Held, this was not a knowing and willful violation of the law. The defendant had the right to assume that the preceding line had not violated the law.⁷⁴

Defendant, a switching line, received several carloads of horses for switching to the yards for unloading after the limit had expired. It did not have access to the billing nor did it have actual knowledge how long the horses had been confined. It promptly unloaded all the cars except one, which, on account of an erroneous order having been given defendant, was first carried to the wrong unloading chute where the horses could not be unloaded without halters. This mistake necessitated the movement of the car to another pen and caused further delay. Held that the carrier was not guilty as to any of the cars, as its action under the circumstances did not constitute a knowing and willful failure to comply with the law.⁷⁵

Where defendant's agent first refused to accept a shipment of stock from a connecting line, knowing that defendant could not unload it within the time limit, but five and a half hours later, upon a second tender did receive it, thinking the animals had been unloaded and fed in the meantime, it was held that defendant was not guilty

(70) U. S. v. St. Joseph Stockyards Co. (Mo.), 181 Fed. 625.

(71) U. S. v. Sioux City Term. Co. (Ia.), 234 Fed. 663.

(72) N. Y. C. & H. R. R. Co. (N. Y.), 203 Fed. 953.

(73) U. S. v. Sioux City Stock Yds. (Ia.), 162 Fed. 556.

(74) St. Joseph Stockyards Co. v. U. S. 187 Fed. 104.

(75) U. S. v. Chicago Jet. Ry. Co. (Ill.), 211 Fed. 724.

if its agent was deceived or misled by the connecting line and on that account unavoidably confined the stock too long. In view of the narrow margin of time available in which the stock could have been unloaded and given five hours' rest it was held to be a case for the jury, the test being whether defendant's agent exercised reasonable care in the premises.⁷⁶

Where a train load of sheep was delayed in reaching an unloading station until after dark on account of a series of unusual accidents to it and other trains, and the men dragged the sheep out of two cars in the dark before the thirty-six hour limit expired, and then, becoming exhausted, left the rest in the cars until morning, it was held that the carrier was not liable for the penalty, the failure to unload not being knowing and willful.⁷⁷

Defendant, initial carrier, delivered a shipment to the second carrier nine hours before the expiration of the time limit. The second carrier first received the car but an hour later it telephoned defendant it could not accept it, because it barely had time to get the stock to the third carrier without exceeding the limit and knew that the third carrier would refuse to receive them. Defendant notified the second carrier that it refused to receive the car back. Nevertheless the second carrier placed the car on the defendant's track before the limit had expired. Defendant had no actual knowledge at the time that the car had been returned to it, and as this was done at ten-thirty P. M., and defendant did not perform switching service at night, the car remained where placed all night and the time limit was exceeded. Next morning defendant switched the car to pens and unloaded it. Held such facts did not constitute a case of knowingly and willfully failing to obey the law.⁷⁸

(76) Oregon-Wash. R. & N. Co. v. U. S. (Ida.), 205 Fed. 342.

(77) Chicago, B. & Q. R. Co. v. U. S. (Neb.), 194 Fed. 342.

(78) U. S. v. Chicago, R. I. & P. R. Co. (Ill.), 211 Fed. 770.

The car arrived and was placed in a suitable place for unloading. The caretaker told the trainmen that he would notify the consignee, who would unload the stock. The carrier's agents, relying on the caretaker's assurances, took no steps to have the stock unloaded. The consignee failed to unload them until after the lawful period had expired and the carrier was prosecuted. The court held that it was for the jury to say whether the failure to unload under such circumstances was willful or due to accidental or unavoidable causes.⁷⁹

The defendant placed a carload of hogs at a pen used solely by the consignee before the expiration of the time limit but after consignee's place of business had closed for the night, and notified consignee to unload. Consignee failed to do so; however, until after the limit had been exceeded. It appeared that the pens were uncovered and about a fourth of a mile from consignee's yards; that it was impracticable to drive the hogs from the pen to the yards in the night; that a blizzard was raging, so that good judgment dictated holding the hogs in the car rather than unloading them into the uncovered pen. The defendant was held not guilty. This was a case where defendant's act was knowingly but not willfully done. Nor was the carrier liable under the circumstances for having failed to provide covered pens.⁸⁰ So under a similar state of facts except that consignee refused to unload on account of a storm, where it appeared that there were no suitable pens within available distance in which the stock could have been unloaded by the carrier, it was held that the carrier was not guilty.⁸¹

The complaint of the Government must allege that the defendant knowingly and willfully failed to comply with the re-

(79) Oregon-Wash. R. & N. Co. v. U. S., 205 Fed. 337.

(80) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 207.

(81) U. S. v. Phila. & R. Ry. Co. (Pa.), 223 Fed. 211.

quirements, but it need not allege that the failure was not caused by storm or other excepted cause.⁸² The knowing and willful character of the failure must be shown by a preponderance of evidence.⁸³ This does not mean, however that the Government must introduce evidence of a direct intent to do injury to the stock. Where complaint alleged that defendant knowingly and willfully confined the stock overtime and the answer denied this, and a stipulation of counsel admitted only that they were confined overtime, the court should neither instruct the jury to find for the defendant, nor direct a verdict against it, but should leave the issue of whether the act was knowingly and willfully done to the jury.⁸⁴

Unit of Offense.—Until the matter was decided by the Supreme Court there was no little confusion among the lower courts as to what the unit of offense was under the law. It was early decided that there could not be a separate penalty imposed for each animal in respect to which the law was violated.⁸⁵ The view held by nearly all of the lower courts was that the shipment is the unit of offense, whether it be a shipment of a single animal, a carload, or several carloads.⁸⁶ The carriers sometimes contended that the train was the unit.⁸⁷

(82) U. S. v. Oregon Short Line (Ida.), 160 Fed. 526.

(83) U. S. v. Lehigh Val. R. Co. (N. J.), 204 Fed. 705; St. Joseph Stockyards Co. v. U. S. (Mo.), 187 Fed. 104.

(84) Chicago & N. W. Ry. Co. v. U. S. (Ill.), 234 Fed. 272.

(85), U. S. v. Boston & A. R. Co. (Mass.), 15 Fed. 209 (arose under old law).

(86) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459; U. S. v. B. & O. S. W. R. Co. (O.), 159 Fed. 33 (train load theory rejected); N. Y. C. & H. R. R. Co. v. U. S. (Mass.), 165 Fed. 833; U. S. v. Oregon, R. & N. Co. (Ore.), 163 Fed. 642; Sou. Pac. Co. v. U. S. (Cal.), 171 Fed. 360.

(87) See U. S. v. St. Louis & S. F. Ry. Co. (Mo.), 107 Fed. 870. (Ten cars of cattle shipped at same time by same consignor to same consignee moved in the same train. Court held that only one offense was committed, and

The law is now settled by the decision of the Supreme Court in Baltimore & Ohio S. W. R. Co. v. U. S.⁸⁸ This case holds that neither the number of animals, nor their ownership, nor the number of shipments, has anything to do with the unit of offense. The test is the number of twenty-eight (or in case of shipper's release, thirty-six) hour periods which expire. For example, if the time limit of several cars handled on the same train will expire at the same time, upon the expiration of the limit only one offense is committed regardless of how many cars or shipments were affected, or of the ownership of the stock, or whether they were consigned to the same or different destinations. So where one car was shipped with thirty-six-hour release and eight hours later another car not released was loaded at another station and handled on the same train, only one offense was committed as to these two cars, since the time limits on them expired contemporaneously. The loading of a number of cars of stock belonging to different owners and destined to different points may be treated as a single act if not discontinuous or unduly prolonged and if the cars are carried in the same train the limit will be deemed to expire at the same time and place as to all, and the over confinement of all the stock will be but a single offense.⁸⁹ It has even been held that where a carload of cattle loaded at one station is handled on the same train with a car loaded a few minutes earlier at another station they may be treated as a unit. The court said:

"There was practically but one offense, and the slight difference in time when the lawful period expired is insignificant, and

seemed to take the view that the train was a unit. It does not appear whether all ten cars were covered by one bill of lading or by ten. If they all constituted but a single shipment, the case is not inconsistent with the shipment-unit theory.)

(88) 220 U. S. 94.

(89) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947. See also B. & O. S. W. R. Co. case, supra.

therefore, giving the statute a reasonable construction, may be disregarded."⁹⁰

Nature of Action.—The remedy for violation of the act is an action by the Government for the penalty. Such action is civil in its nature and subject to all the incidents of a civil suit.⁹¹ Hence the government need only prove its case by a preponderance of evidence,⁹² and in case of an adverse decision may appeal.⁹³ Violation of the Act is not a crime.⁹⁴

Amount of Penalty.—The minimum penalty is one hundred dollars and the maximum five hundred. Within these limits it is the court's province to fix the amount after verdict in accordance with the heinousness of the offense.⁹⁵ In fixing the amount the court may properly consider the fact that the defendant had or had not instructed its employees to strictly obey the law,⁹⁶ or in an action against a connecting carrier for receiving a shipment confined overtime, that the first carrier had already been fined.⁹⁷

JOHN PURYEAR.

Washington, D. C.

(90) U. S. v. N. Y. C. & H. R. R. Co. (N. Y.), 191 Fed. 938.

(91) U. S. v. Atlantic C. L. R. Co. (Va.), 178 Fed. 764.

(92) U. S. v. Sou. Pac. Co. (Cal.), 157 Fed. 459; U. S. v. Sou. Pac. Co. (Cal.), 162 Fed. 412; Atchison, T. & S. F. Ry. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15. *Contra:* U. S. v. Louisville & N. R. Co. (Ky.), 157 Fed. 979 (criminal in nature and Government must prove its case beyond reasonable doubt).

(93) Baltimore & Ohio S. W. R. Co. v. U. S. 220 U. S. 94. U. S. v. Baltimore & Ohio S. W. R. Co. (O.), 159 Fed. 33.

(94) Montana C. R. Co. v. U. S. (Mont.), 164 Fed. 400.

(95) U. S. v. Sou. Pac. Co. (Cal.), 162 Fed. 412; Missouri, K. & T. Ry. Co. (Kan.), 178 Fed. 15; Atchison, T. & S. F. Ry. Co. v. U. S. (Kan.), 178 Fed. 12; Missouri, K. & T. Ry. Co. v. U. S. (Kan.), 178 Fed. 15; U. S. v. Boston & A. R. Co. (Mass.), 15 Fed. 209.

(96) U. S. v. Delaware, L. & W. R. Co. (N. Y.), 220 Fed. 944.

(97) U. S. v. Nor. Pac. Term. Co. (Ore.), 186 Fed. 947.

EVIDENCE—ATTEMPT TO SUPPRESS.

STATE v. LITTLE.

Supreme Court of North Carolina.
Nov. 21, 1917.

94 S. E. 97.

Evidence of an assault by defendant upon the prosecuting witness during the term of court was competent as showing an effort to suppress evidence or to intimidate a witness.

Allen, J. A juror was called and stated upon his examination that he would not convict anyone on the testimony of W. E. Reynolds, the witness upon whom the state had to rely for a conviction, and the court, in the exercise of its discretion, excused him from service on the jury, and the defendant excepted. This ruling is clearly correct. State v. Vann, 162 N. C. 538, 77 S. E. 295. But if erroneous it was not prejudicial, as it does not appear that any juror was challenged, or that the jury which served was not one entirely satisfactory to the defendant. State v. Cunningham, 72 N. C. 469.

The state was permitted to prove, over the objection of the defendant, that the defendant made a violent assault on the prosecuting witness, Reynolds, during the term of court, and this was referred to in the charge to which defendant excepted. This evidence was competent on the question of the guilt of the defendant as a circumstance tending to show an effort to suppress evidence or to intimidate a witness against him.

The evidence of Baldwin as to a conversation with the witness Reynolds was properly admitted as corroborative, and to this his honor confined it.

The fifth, sixth and seventh exceptions are taken to the solicitor's manner of questioning the defendant on cross-examination, the objectionable remarks being as follows:

"Now, tell me the truth about this, if you know how." "Now, Mr. Little, I want you to answer this question; you have been dodging me." "Come on, and tell me what trouble you had."

The remarks preceded the various questions the solicitor asked the witness, and while they may not have been altogether polite, and are in the nature of comments which ought to have been reserved for argument before the jury, they do not exceed the bounds of legitimate discussion, and cannot be held reversible error.

After verdict the defendant moved for a new trial because a member of the petit jury was a member of the grand jury, which passed on

the bill of indictment against him, which was denied. This motion was addressed to the discretion of the judge and his decision thereon is not reviewable.

"It has always been held by us that a motion to set aside the verdict because of a defect as to one of the jurors comes too late after verdict, and addresses itself only to the discretion of the court. Walker, J., in *State v. Lipscomb*, 134 N. C. 697 (47 S. E. 44). In that case it was shown that the juror was under 21 years of age. In *State v. Maultsby*, 130 N. C. 664 (41 S. E. 97), the same ruling was made where a relationship was discovered after verdict between the prosecuting witness and a juror, and the court there cited many other cases where a disqualification of a juror on diverse grounds had been found after verdict, and in all which cases the court held that the matter rested in the discretion of the trial judge, and that the refusal of the motion was not reviewable on appeal." *State v. Drakeford*, 162 N. C. 671, 78 S. E. 309.

The defendant also moved to set aside the verdict, because, on the day before the trial of the defendant, his honor said to five jurors who had stood for the acquittal of one Hinson, charged with retailing, that "they hindered the machinery of justice in holding out against the verdict of guilty, but that if the position they took was taken by reason of their conscientious judgment in the matter, that he had respect for them and that they were entitled to their judgment, and further suggested to the five men who stood for acquittal, that if there were any reasons arising out of prejudice or opposition to the law, why they should not return a verdict of guilty in a retailing case, that the court would relieve them of further duty from that date, but that if it was a mere question of judgment that they could return, that the matter was left with them."

No relation is shown between the two cases, none of the evidence in the Hinson case is set out, nor are the circumstances shown which caused the remarks to be made, and we cannot see that they were not entirely justified.

In any event, the defendant knew all the facts before the trial began, and he could not wait until after verdict, and then bring the matter to the attention of the court for the first time, except by an appeal to its discretion, which is not reviewable.

We have considered all of the exceptions and find no error.

No error.

Note.—Suppression of Evidence in Criminal Case Creating Presumption Against Defendant.—In a very noted case in American jurisprudence, that of *Com. v. Webster*, 5 Cush. (Mass.) 295, one of our greatest judges, Shaw, C. J., said in his charge to the jury that: "All attempts on the part of the accused to suppress evidence, to

suggest false and deceptive explanations and to cast suspicion, without just cause, on other persons, all or any of which tend to prove consciousness of guilt, and, when proved to exert an influence against the accused "are admissible in evidence." The court, however, added the caution that: "This consideration is not to be pressed too urgently; because an innocent man, when placed by circumstances in a condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs."

As a North Dakota case (*State v. Rozum*, 8 N. D. 548, 80 N. W. 477) states the matter, in a case where a proposed witness was threatened with violence, and it was evident that he was being intimidated, this "raises a presumption that such evidence is detrimental to the party seeking to destroy or withhold it." How strong the presumption it is not said. It is not meant to say, that there arises any presumption of the truth of the evidence.

In *Snell v. Bray*, 56 Wis. 156, 14 N. W. 14, the court adopted as a statutory rule, in a case where a letter warning another against testifying in an expected law suit, that laid down by Cockburn, C. J., in *Moriarity v. Ry. Co.*, 5 L. R. Q. B. 314. There the Chief Justice said: "The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of the defense, if he is defendant, is honest and just, just as it is evidence against a prisoner that he has said one thing at one time and another at another, as showing that recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So if you can show that a plaintiff has been suborning false testimony and has endeavored to have recourse to perjury, it is strong evidence that he knew perfectly well that his cause was an unrighteous one. I do not say it is conclusive. I fully agree that it should be put to the jury with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action any more than has a prisoner making a false statement to aid his appearance, if innocence is necessarily a proof of guilt, but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts."

In *Levison v. State*, 54 Ala. 519, defendant was shown by an accomplice to have visited her on the night of his arrest, but when he knew he would be arrested. While she was lying in bed defendant whispered to her and was heard to tell her to "lie still and keep your damned mouth shut."

The court said it was natural that: "The subject of the conversation would be the anticipated arrest, and entreaty, persuasion, threats or commands would be employed to keep her from purposely or by inadvertence disclosing their mutual guilt," if he was guilty. "Considering the

circumstances, we cannot say this evidence had not a relevancy to the main and material fact."

In People v. Chin Hane, 108 Cal. 597, 41 Pac. 697, one on trial for murder, it was shown over objection of defendants, that they each told a witness called to identify them, that they would kill him, if he testified. The court said: "Threats made by a defendant against a witness whom he expects to testify against him, with the evident purpose of intimidating the witness, are proper evidence."

In Kessier v. State, 154 Ind. 242, 56 N. E. 232, the state was permitted to show, that after defendant had made an ineffectual effort to induce a witness to enter his employment, said to him: "If you give us any trouble, and send me over the road, or so I will go there, I have brothers that will watch you all your life." The court cited numerous cases to the effect that attempts to bribe, or intimidate witnesses may properly be considered in determining the guilt or innocence of a person charged with crime; but they are not conclusive. Such conduct is regarded as in the nature of an admission that the party has a bad case, which cannot be supported by honest proof."

After all, such evidence is but a fact of more or less weight according to the circumstances of the acts complained of being committed. It would seem to require some independent evidence, which it is intended to support.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYER'S ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 139.

Employment; Relation to Other; Attorneys; Relation to Client; Civic Duties—Duties of lawyer, who has declined employment to appear at public hearing ostensibly as a citizen and taxpayer but in fact as hired advocate. Shall he make public disclosure of attempt to employ him, and of his other relevant knowledge?—A, an attorney, is approached by the attorneys for a public service corporation, with whom he has no previous acquaintance, and is asked to appear at a public hearing as a citizen and taxpayer to object to action to which the corporation is opposed; the attorneys offer to pay him a fee for doing so. A declines the employment. The attorneys, in the course of the conversation, inform A that his name has been suggested by X, an attorney and a man of prominence and influence, as one who may be available

for the purpose; after A declines, they mention the names of some others who had been suggested for this employment and ask A's views as to their availability; they particularly inquire about Y, another attorney of prominence in local politics. A takes no part in the matter referred to. He subsequently learns that at the hearing Y appeared as a citizen and taxpayer in opposition to the action referred to. The subject matter of the hearing is involved in a subject which is about to come up for important public action. Knowledge on the part of the public of the foregoing facts and particularly of the relations of X and Y and of the corporation and its attorneys to the transaction might materially influence the attitude of the public on the question. Whether that influence would tend toward a desirable or an undesirable result is not at present clear to A, partly because persons on both sides of the controversy are likely to be affected by the disclosure.

The questions on which the Committee's opinion is asked are:

- (1) Would A have been justified in accepting the employment offered?
- (2) What is A's duty with respect to making public disclosure of the facts stated above and more particularly:
 - (a) Is he under a duty to the corporation and its attorneys not to disclose them?
 - (b) Is he under a duty to the public to disclose them?
 - (c) Is he justified in entering into a public discussion on the merits of the question in which he will express his own personal views without disclosing the foregoing facts?
 - (d) Is he justified in using his own judgment and in disclosing or not disclosing the foregoing facts, according, as in his own opinion, their disclosure will tend to action in the public interest or the reverse?

ANSWER No. 139.

In the opinion of the Committee:

- (1) It would have been improper for the attorney to masquerade as suggested. (See Canon 26 of the American Bar Association.)
- (2) (a) No. The employment offered was not of proper professional nature and therefore imposed no confidential relation.
- (b) No; but he may use his discretion.
- (c) Yes.
- (d) Yes.

QUESTION No. 140

Employment—Accepting employment as counsel for, and having financial interests in, corporation organized for investigating over-

charges by public-service corporations, advising shippers, etc., thereof, and obtaining redress therefor; disapproved.—Would it be ethical and proper for a lawyer to have financial interest in, and be retained as counsel for, a company organized for the special purpose of making investigations of rates and charges of public-service corporations, advising such latter corporations' patrons of over-charges, and taking same up for adjustment, or litigating same, through its counsel aforementioned, before the appropriate commission or other regulating body?

ANSWER No. 140.

This Committee does not pass upon the question whether or not the Company is practicing law in violation of the statutes of this state. That question is peculiarly within the province of another committee of this association. But the arrangement described in the inquiry appears to the Committee to constitute a device for systematically obtaining business for a lawyer, and for stirring up litigation for profit. For that reason, in the opinion of the Committee, the lawyer's participation therein is improper.

BOOK REVIEW.

BLACK ON INCOME AND OTHER FEDERAL TAXES.

This work is by Mr. Henry Campbell Black, of Washington, D. C., author of treatises on Income Taxes, Bankruptcy, Rescission of Contracts, Constitutional Law, etc. It contains the War Revenue Act of Oct. 3, 1917, and follows up his work on Income Taxes, both because of the enactment of that Act. The scope of this work is wider than the prior work. It treats of internal revenue taxes, estate tax, excess profits tax, etc., etc., and reference is made not only to judicial rulings, but to rulings and regulations of departments.

It is intended that the work not only shall be valuable to the profession, but also to business men and investors.

The work is logical in arrangement and style of the writer, is bound in law buckram, of typographical excellence, and issues from Vernon Law Book Company, Kansas City, Mo., 1917.

HUMOR OF THE LAW.

The big, flat-footed, hungry negro was up for theft.

"I caught him nippin' a fresh-made pumpkin pie from the MacGregor house on Marguerite street," explained Officer Carey.

"Did you?" demanded the judge.

"Dat's a rough word, yo' Honah—sayin' I done stole hit. Now as ter de truf"—dat pumpkin pie was settin' dar on de winder ledge, abandoned, Jedge. Nobody nowhar nigh hit, Jedge. Hit wuz a case ob 'justifiable adoption,' brought on by de Christmas sperrit."—Case and Comment.

It was the day following Christmas, and Peter Anderson was before the court for being "drunk and disorderly."

"Peter," said Judge Briles, "can't you realize that Christmas time is the last time in the world for riotous conduct? It's a purely religious occasion. Christmas and drink do not go together. Why is it that a man can't enjoy the good things of the holiday period without—"

The accused suddenly interrupted.

"Wait, Jedge—wait," he said, "dey ain't no use ob yo' wastin' all dem fancy words. Crismus didn't hab nuthin' ter do wid me an' mah drinkin'. Hit dates back ter de 'lection not going ter suit me."—Case and Comment.

The Old Timer looked up from his ricky and asked:

"You think that story on Bill Sims is a good one, eh?"

"Good or bad, it's true."

"Well, so is this," said the Old Timer, "and it happened down in Texas by the Rio Grande. I used to live down that way for a while, and in the village which I graced with my presence a certain old horse doctor was elected justice of the peace. What he didn't know about the law was sufficient. He knew nothing; he should have made an ideal justice of the peace."

"His first case, however, was that of a man arrested for stealing a horse.

"Guilty or not guilty?" asked the justice.

"Not guilty," answered the prisoner.

"Then, what the deuce are you doing here?" demanded the justice of the peace. "Get out!"—San Francisco Chronicle.

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
Last Resort and of ALL the Federal Courts.**

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1. Adverse Possession — Presumption.—In trespass to try title, where it appeared that plaintiffs asserted right to the land which it was claimed had not been asserted by their ancestors for 50 years, the question of the presumption of the grant by reason of the lapse of time should be submitted to the jury.—*House v. Stephens*, Tex., 198 S. W. 384.

2.—Sufficiency of Possession.—Where line to which plaintiff claimed was marked by weeds and brush and he cultivated to within a few feet thereof and the adjoining owners only cultivated thereto, plaintiff held to have a sufficient possession to ripen into title.—*Bugner v. Chicago Title & Trust Co.*, Ill., 117 N. E. 711.

3. Animals—Damages.—Where defendant was not, in writing, notified to dip his cattle, horses and mules to eradicate fever ticks until after the filing of the complaint and information, he cannot be convicted on account of failure.—*McGee v. State*, Tex., 198 S. W. 302.

4. Arbitration and Award—Attacking Award.—A party to an award who attacks it on the ground that the arbitrators did not furnish a transcript of evidence, and that each member of the board did not read the testimony before making the award, as required by the agreement, must show that such condition was not complied with.—*Clark v. Courier*, Ill., 117 N. E. 720.

5. Attorney and Client—Contingent Fee.—Plaintiffs' contract being on a 50 per cent basis, where defendant settled with plaintiffs' client without plaintiffs' knowledge, paying client \$4,000 and agreeing to pay attorney's fees, plaintiffs are not limited to 50 per cent of the

\$4,000.—*Myton v. New York, C. & St. L. R. Co.*, Mo., 198 S. W. 189.

6.—Disbarment.—An attorney, converting his client's money to his own use with full knowledge on his part of the violation of his professional obligation, will be disbarred.—*In re Wilkenfeld*, N. Y., 167 N. Y. S. 508.

7.—Discharge of Attorney.—Client has right arbitrarily to discharge his attorneys, and if he does so he is liable for services rendered by them only up to time of discharge.—*In re Board of Water Supply of City of New York*, N. Y., 167 N. Y. S. 531.

8.—Stale Charge.—Where alleged unprofessional conduct occurred seven years ago, and the matter has been before the courts and examined by the bar associations, which failed to find sufficient ground to present charges, a proceeding for discipline will be dismissed.—*In re Tuck*, N. Y., 167 N. Y. S. 534.

9. Bankruptcy—Bidder at Sale.—Unsuccessful bidder at sale of bankrupt's property held without standing to oppose confirmation, because he would have bid more if property had been sold as a whole, instead of separately.—*Jacobsohn v. Larkey*, U. S. C. C. A., 245 Fed. 538.

10.—Estoppel.—That one creditor of a bankrupt had orally promised another creditor of the same class that its claim should be paid does not estop the former from receiving dividends equally with the latter.—*Moise v. Scheibel*, U. S. C. C. A., 245 Fed. 546.

11.—Preference.—As respected question of preference, held that transaction whereby claimant advanced \$1,000 and took mortgage to secure it and previous loans by his wife, was not changed in legal effect by the indirect manner in which it was carried out.—*In re Sutherland Co.*, U. S. D. C., 245 Fed. 663.

12.—Preference.—Where the bankrupt gave a mortgage less than four months before his adjudication as bankrupt, covering the entire stock of goods in trade and the mortgagee permitted him to sell the goods and treat them as his own without applying the proceeds to the debt, the mortgage was invalid as against creditors.—*Pierre Banking & Trust Co. v. Winkler*, S. D., 165 N. W. 2.

13.—Stock Subscription.—A creditor of a bankrupt corporation, who was also holder of unpaid stock, held erroneously required to pay his stock subscription in full as a condition to the allowance of his claim.—*Moise v. Scheibel*, U. S. C. C. A., 245 Fed. 546.

14. Banks and Banking—Coupon Holders.—Bank, made depository of railroad funds to pay coupons on two bond issues, held not a trustee for the coupon holders, and receiver of railroad was entitled to the balance of the fund yet unpaid to coupon holders.—*Noyes v. First Nat. Bank*, N. Y., 167 N. Y. S. 288.

15.—Stockholder.—A bank does not become party to a stockholder's contract of sale of his stock, giving his right to share in doubtful assets collected by it, by its retaining and collecting them.—*First Nat. Bank v. Armstrong*, Ky., 198 S. W. 226.

16. Bills and Notes—Joint and Several Signers.—Where several signed a note reading, "We, or either of us, promise to pay," etc., it is a

promise jointly and severally, and the holder may sue any one of parties without suing the other.—Williams v. First Nat. Bank, Ga., 94 S. E. 73.

17.—**Renewal.**—If a note is without consideration, a renewal thereof, although extending time of payment, is also without consideration, and evidence bearing on want of consideration of the original note, tending to establish fraud in its inception, is admissible.—City Nat. Bank of Auburn, Ind., v. Mason, Ia., 165 N. W. 103.

18. **Bridges—Maintenance.**—Correct measure of duty of defendant town was maintenance of bridge of sufficient strength to bear up weight of any vehicle that could reasonably be expected in vicinity where it was placed.—T. J. Carter & Co. v. Town of Leakesville, N. C., 94 S. E. 6.

19. **Carriers of Live Stock — Damage in Transit.**—In action by shipper of live stock for damages in transit, it was error to permit him to testify that he met a man who said he was the yardmaster, and who on request refused to give assistance in taking care of cattle, in the absence of proof that such person was in fact the carrier's yardmaster.—Texas & P. Ry. Co. v. Thorp, Tex., 198 S. W. 335.

20. **Carriers of Passengers—Care of Infant.**—On evidence in action for death of plaintiff's infant son, while a trespasser on running board of sight-seeing car, from alleged willful and wanton negligence of driver, held that decedent's failure to exercise due care according to his capacity was for jury.—Madden v. S. L. Mitchell Automobile Co., Ga., 94 S. E. 92.

21. **Commerce—Employees.**—Death of painter struck by interstate train while trying to remove from the track a speeder on which he went after paint, held not covered by the federal Employers' Liability Act, § 1.—Jackson v. Industrial Board of Illinois, Ill., 117 N. E. 705.

22.—**Spur Tracks.**—Where railroad company, whose tracks were wholly within state, maintained private spur track at expense of owner, over which it hauled freight cars to owner's premises, laborer repairing spur track was not engaged in interstate commerce, notwithstanding railroad sometimes hauled interstate freight over track.—In re Liberti, N. Y., 167 N. Y. S. 478.

23.—**Workmen's Compensation Act.**—A carpenter, employed in repairing coal chutes through which coal passed to interstate locomotives, was not engaged in interstate commerce, so as to prevent the award of compensation to his minor children, under Workmen's Compensation Law.—Gallagher v. New York Cent. R. Co., N. Y., 167 N. Y. S. 480.

24. **Common Carriers—Rates.**—Contract between telegraph and railway companies for "off-line" services at less than published rates, though valid when made prior to Act June 29, 1906, c. 3591, is prohibited thereby.—Chicago, Great Western R. Co. v. Postal Telegraph-Cable Co., U. S. D. C., 245 Fed. 592.

25. **Constitutional Law—Due Process of Law.**—Due process of law requires that the fact of a contract of employment within the Workmen's Compensation Act shall be determined judicially by evidence required to establish any other contractual relation.—Kackel v. Serviss, N. Y., 167 N. Y. S. 348.

26.—**Due Process of Law.**—In suit against railroad, trial court's holding that stipulation in road's pass which exempted it from liability for injuries resulting from its negligence was void did not contravene due process provisions of federal and state constitutions.—Galveston, H. & S. A. Ry. Co. v. Mullen, Tex., 198 S. W. 409.

27. **Corporations—By-Laws.**—Verbal by-laws limiting the power of a corporation president to execute a note are binding on a payee, who knows of such by-laws, and where there is evidence of such knowledge, such by-laws can be shown in evidence.—Phillips v. Interstate Land Co., N. C., 94 S. E. 12.

28.—**Foreign Corporation.**—A foreign private corporation, maintaining no office in West Virginia and transporting its products to market by its own steamboats and barges, along the Ohio River from Pittsburgh to points not in the state, was not doing business in the state, within Code 1913, c. 124, relating to service of process.—Hayman v. Monongahela Consol. Coal & Coke Co., W. Va., 94 S. E. 36.

29.—**Instructions.**—In action for breach of contract to purchase, in future, from plaintiff stock of insurance company, statement made by company to insurance department as to book value of stock was not conclusive, and exclusion of evidence, as to financial condition of company as going concern was error.—Tuthill v. Sherman, S. D., 165 N. W. 4.

30. **Covenants—Incumbrance.**—An easement in a wall entirely on one lot by the owner of an adjoining lot, who had the joists of his building resting in such wall, was an "incumbrance" on the first lot within Kirby's Dig., § 731.—Kahn v. Cherry, Ark., 198 S. W. 266.

31. **Damages—Actual.**—Where lessee agreed to pay certain rental, and further covenanted to remodel and improve building within six months, expending not less than \$5,000, and bond secured performance in penal sum of \$5,000, sum of \$5,000 was not liquidated damages and lessor on breach could recover only actual damages.—Giesecke v. Cullerton, Ill., 117 N. E. 777.

32.—**Mitigating Loss.**—Where one enjoined from fencing a roadway finally prevailed and it appeared that he could have moved his fence back pending litigation for \$75, he cannot obtain \$907 damages on the injunction bond for damages from loss of the use of fields left open.—Johnson v. Brown, Tenn., 198 S. W. 243.

33.—**Penalty.**—Provision that contractor will pay owner \$50 per day for every day work on building remains uncompleted after specified time will be construed as provision for penalty where delay would probably cause much less loss than \$50 per day, and damages could probably be easily ascertained.—Grant Marble Co. v. Marshall & Ilsley Bank, Wis., 165 N. W. 14.

34. **Death—Last Clear Chance.**—In an action for death, an allegation that deceased was "in the exercise of ordinary care" does not preclude the benefit of the last chance rule.—Bybee v. Dunham, Mo., 198 S. W. 190.

35. **Dedication—Recognition.**—Deeds describing property as running back a specified distance to an alley, thereby excluding an alley 20 feet wide, held either a dedication or a recognition of an abutting owner's right to a pass-way by necessity.—Nieten v. Kimsey, Ky., 198 S. W. 203.

36. Divorce—Decree in Rem.—Divorce decree is decree in rem, binding on all the world in so far as it alters status of spouses, but not binding on persons not parties to action in so far as it affects custody of child of the marriage, though it attempt to fix its custody beyond joint lives of parents.—*In re De Saulles, N. Y.*, 167 N. Y. S. 445.

37. Easements—Building.—Where an owner sold and warranted lots in two parts, the joists of a building on the first sold, resting in the wall of a building situated on the other part, was an easement on the second part.—*Kahn v. Cherry, Ark.*, 198 S. W. 266.

38. Election of Remedies—Bar.—Where one has rights of action at common law and under a statute for the same injury, the bringing of either of such suits is not a bar to the other, particularly where no recovery has been had.—*Jackson v. Industrial Board of Illinois, Ill.*, 117 N. E. 705.

39. Eminent Domain—Agreement on Compensation.—Under Eminent Domain Act, authorizing condemnation when parties cannot agree upon compensation, a landowner must know identity of prospective purchaser and proof of inability to agree with a railroad's agent, who did not disclose his principal's identity, is insufficient.—*Pittsburgh, C. C. & St. L. Ry. Co. v. Gage, Ill.*, 117 N. E. 726.

40. Exchange of Property—Laches.—Delay in investigating Michigan land for nearly a year by seller of land in Iowa, who took Michigan land in part payment, with knowledge buyers were expending money in improving Iowa land, held not such laches as to bar seller's action to recover for buyers' misrepresentation of value of Michigan land.—*Bronson v. Lynch, Ia.*, 165 N. W. 35.

41. Executors and Administrators—Equity.—Equity has jurisdiction of bill for distribution of funds in hands of administrator of a decedent, brought by executor and distributees of a testatrix against him and others claiming as heirs of testatrix, alleging that testatrix was sole heir of funds, etc., and administrator's refusal to turn them over because of adverse claims.—*Lynch v. Armstrong, W. Va.*, 94 S. E. 24.

42. Frauds, Statute of—Renewal of Lease.—Where a lease for five years gives a privilege of renewal for five years, an election in writing to be bound for the additional term satisfies the statute of frauds.—*Thurston v. F. W. Woolworth Co., Ind.*, 117 N. E. 686.

43. Fraudulent Conveyances—Voluntary Conveyance.—Voluntary conveyance by man to his wife's brother, for the benefit of his wife and daughter, at a time when he was solvent, not contemplating any hazardous business, and without intent to defraud creditors, held not fraudulent.—*Chatham & Phoenix Nat. Bank v. Lovegrove, U. S. C. C. A.*, 245 Fed. 553.

44. Garnishment—Lawful Service.—After judgment against three parties jointly and severally liable on note, affidavit of illegality in garnishment proceeding was properly dismissed, where two who had signed as sureties for the third were legally served, though third was not legally served in original suit.—*Williams v. First Nat. Bank, Ga.*, 94 S. E. 73.

45. Habeas Corpus—Jurisdiction.—If it appears from petition and return in habeas corpus proceeding that court which rendered judgment under which prisoner is held, had jurisdiction of person and subject-matter, court to which habeas corpus petition is addressed has no jurisdiction to discharge, and judgment discharging from further imprisonment is void.—*People v. Green, Ill.*, 117 N. E. 764.

46. Highways—Registering Automobile.—Failure of automobile driver to register car and place number thereon, held not to make him liable for damages in collision; there being no causal relation between such failure and the collision.—*Mumme v. Sutherland, Tex.*, 198 S. W. 395.

47. Homestead—Joinder of Wife.—Where in a deed of trust a husband alone is described as "parties of the first part" and the granting includes "all our right or claim to homestead" and "B., wife of * * * do relinquish * * * all her right of dower," it is not valid under Kirby's Dig., § 3901, relating to homesteads, although signed by the wife and although her acknowledgment contains a release of both homestead and dower rights.—*Shurn v. Wilkinson, Ark.*, 198 S. W. 279.

48. Husband and Wife—Community Property.—Where a husband abandoned his wife and she and children of the marriage are in necessitous circumstances, she may, without the husband's joinder or consent, convey community property passing good title.—*Hadnot v. Hicks, Tex.*, 198 S. W. 359.

49. Eminent Domain—Husband.—Husband, notwithstanding wife's interest in his realty, may in his own right recover damages from its taking under right of eminent domain.—*McCullough v. St. Edward Electric Co., Neb.*, 165 N. W. 157.

50. Insurance—Burglary.—A burglary policy for loss by "persons who shall have made entry into safes by use of tools or explosives directly therewith," does not cover a burglary where the building is broken into, the safe opened by working the combination, and the inner wooden drawers, containing the money, broken open.—*Blank v. National Surety Co., Ia.*, 165 N. W. 46.

51. By-Laws.—Where benefit certificate so provided, insurer held bound by by-law subsequently adopted requiring x-ray photograph as part of proof of disability.—*Eminent Household of Columbian Woodmen v. Wicker, Miss.*, 76 So. 634.

52. Indemnity Policy.—Under an indemnity policy providing for an increased amount if insurer did not take advantage of offer of compromise made by injured employee or his duly authorized representative, widow could not make offer binding the insurer to the increased amount.—*Georgia Life Ins. Co. v. Mississippi Cent. R. Co., Miss.*, 76 So. 646.

53. Insurable Interest.—Anyone deriving benefit from existence of property or who would suffer from its loss has an "insurable interest," though having only an equitable title or other qualified property.—*Rolater v. Rolater, Tex.*, 198 S. W. 391.

54. Permanent Loss.—Color blindness, so impairing sight that member of brotherhood of railroad trainmen carrying disability insurance was unable to continue in train service and was discharged, held a complete and permanent

loss of sight of both eyes within insurance certificate.—*Routt v. Brotherhood of Railroad Trainmen*, Neb., 165 N. W. 141.

55.—Violation of Law.—Under a policy of insurance denying recovery, where death was caused by violation of law, recovery could be had for death of one who was the aggressor in a pistol fight, but who had retired from the conflict at the time of a shot from a bystander causing his death.—*Eminent Household of Columbian Woodmen v. Howle*, Ark., 198 S. W. 286.

56. **Interest—Partnership Accounting.** — A written contract of partnership in an accounting where there are losses, and one partner is found indebted to another for advance, is not an "instrument in writing," within the meaning of the statute on interest, such as to entitle the party making advances to interest.—*Mariner v. Gilchrist*, Ill., 117 N. E. 695.

57. **Landlord and Tenant—Estoppel.** — Where demised premises were regularly flooded by overflow of sewer in severe storms, and lessee remained in possession for over 10 months, during which time premises were often flooded, lessor cannot be held liable for injuries to tenant's property on account of such flooding.—*Baitzel v. Rhinelander*, N. Y., 167 N. Y. S. 343.

58.—Property Leased.—Term "theater supplies" in lease, as understood in film business, includes those minor incidentals necessary to conduct of business which are kept by film exchange for accommodation of trade.—*McCullough Realty Co. v. Laemmle Film Service*, Ia., 165 N. W. 33.

59. **Libel and Slander—Libel per se.** — To falsely publish of one in reference to her capacity as teacher that she is incompetent is libelous per se.—*Cafferty v. Southern Tier Pub. Co.*, N. Y., 167 N. Y. S. 413.

60.—Mitigation.—Excitement at time of making a slanderous remark as to chastity of female is admissible as bearing upon issue of intent, but not as a defense, unless it amounted to temporary insanity.—*Pickerell v. State*, Tex., 198 S. W. 303.

61.—Privileged Communication.—An attorney correspondent of a credit company, in the absence of malice or bad faith, did not exceed his legal rights in sending a substantially correct itemized statement obtained direct from plaintiff, to his principal, adding thereto that some action should be taken, by all creditors, although he solicited the claims against plaintiff.—*Simons v. Petersberger*, Ia., 165 N. W. 91.

62. **Livery Stable and Garage Keepers—Mechanic asserting lien for repairs cannot re-chances' Lien.** — Owner of motor car held by cover possession where, admitting that he authorized part of work, and that he had not paid or offered to pay therefor and thus discharge lien, though he disputed total of amount claimed.—*Knauff v. Yarbray*, Ga., 94 S. E. 75.

63. **Malicious Prosecution—Advice of Counsel.** — Where prosecutor set forth in complaints all facts and judges to whom they were presented deemed them sufficient, held prosecutor was not liable for malicious prosecution, same rule applying as where one acts on advice of counsel.—*Glenn v. Lawrence*, Ill., 117 N. E. 757.

64. **Mandamus—Remedy.** — Where plans of a proposed milk depot were not in compliance

with the ordinances, and a permit was refused, the builder should have submitted proper plans before applying for mandamus to compel the issuance of a permit.—*People v. City of Chicago*, Ill., 117 N. E. 779.

65. **Master and Servant—Contract.** — Where employer deducted \$1 from wages each month, for which he was to furnish a staff of doctors to render medical attention to the employees' families when requested, there was a contract based upon a valuable consideration.—*Owens v. Atlantic Coast Lumber Corp.*, S. C., 94 S. E. 15.

66.—Contract of Employment.—Where plaintiff's decedent, a resident of New Jersey, was killed in the employ of a New Jersey corporation, the contract having been made in New Jersey, the New Jersey Compensation Law governs, although the accident happened in the state of New York.—*Barnhart v. American Concrete Steel Co.*, N. Y., 167 N. Y. S. 475.

67.—Course of Employment.—Under Workmen's Compensation Act, § 3, subd. 4, as amended by Laws 1916, c. 622, employee of contractor doing work in garage and killed during noon hour while in boiler room held not killed by an accident arising out of and in the course of his employment.—*Manor v. Pennington*, N. Y., 167 N. Y. S. 424.

68.—Course of Employment.—Under Workmen's Compensation Law, § 2, group 22, and § 3, subd. 4, as amended by Laws 1916, c. 622, § 2, apartment house janitor, injured by falling while cleaning window, held entitled to compensation.—*Zubradt v. Shepard's Estate*, N. Y., 167 N. Y. S. 306.

69.—Course of Employment.—In proceeding under Workmen's Compensation Law, held injuries sustained by city employee, supervising construction of subway, while taking bath preparatory to going to office to make up estimates, arose out of and in course of employment.—*Sexton v. Public Service Commission of City of New York*, N. Y., 1667 N. Y. S. 493.

70.—Discharge from Employment.—When employer assigns grounds for discharge of employee, he cannot afterwards justify it on other grounds which were not at the time made basis of termination of contract.—*Levy v. Jarrett*, Tex., 198 S. W. 333.

71.—Employer's Liability.—Employer's payment of wages of injured employee, its insurance policy taken out with reference to Burke-Roberts Employers' Liability Act, its receipts for wages taken by it under Louisiana Workmen's Compensation Act, and its reimbursement from insurer, held to eliminate question whether employee was entitled to compensation under act.—*Summers v. Woodward, Wight & Co.*, La., 76 So. 674.

72.—Hazardous Employment.—As to claimant, employed by Public Service Commission to supervise construction of subway, held, city was engaged in hazardous employment, within Workmen's Compensation Law, § 2, group 13, as amended by Laws 1916, c. 622, and was liable for injuries in view of group 43.—*Sexton v. Public Service Commission of City of New York*, N. Y., 167 N. Y. S. 493.

73.—Interstate Commerce.—A plumber, employed in the maintenance of ways department of an interstate carrier, who was repairing pipes in a station, and was killed by a train while crossing tracks in the course of his employment, was entitled to no compensation, since he was engaged in interstate commerce.—*Vollmer v. New York Cent. R. Co.*, N. Y., 167 N. Y. S. 426.

74.—Limitation of Action.—One injured January 10, 1916, who filed claim January 10, 1917, filed same within one year required by Workmen's Compensation Law, § 28.—*Hudspeth v. Pierce-Arrow Motor Car Co.*, N. Y., 167 N. Y. S. 418.

75.—**Res Ipsa Loquitur.** — Doctrine of res ipsa loquitur held not to apply to sudden jerking, to unusual degree, of freight train, when about to stop for water, throwing conductor.—*Hunt v. Chicago, B. & Q. R. Co.*, Ia., 165 N. W. 105.

76.—**Respondeat Superior.** — Owner of automobile, leaving it with garage keeper either as prospective buyer or sales agent, held not liable

for his negligence while driving it for demonstration.—*Emery v. McCombs*, N. Y., 167 N. Y. S. 474.

77.—**Respondeat Superior.**—A gas company loaning its automobile to its employees to attend a picnic, held not liable for an injury sustained by plaintiff being struck by such automobile after the driver had taken the employees to their homes.—*Stenzler v. Standard Gaslight Co.*, New York City, N. Y., 167 N. Y. S. 282.

78.—**Statutory Construction.**—Claim of person employed under New York contract, injured away from his employer's plant in New Jersey, held covered by the New York statute.—*Gilbert v. Des Lauriers Column Mould Co.*, N. Y., 167 N. Y. S. 274.

79.—**Workmen's Compensation Act.**—Oral notice to assistant foreman of injury is not sufficient under Workmen's Compensation Law on which to base finding of no prejudice for failure to give written notice, where such assistant did not notify the employer, although it was his duty to do so.—*In re Dorb*, N. Y., 167 N. Y. S. 415.

80.—**Workmen's Compensation Act.**—A retail coal dealer held not engaged in the business of storage within Workmen's Compensation Law, § 2, group 29, so that the dependent of an employee injured while loading coal was not entitled to compensation thereunder.—*In re Roberto*, N. Y., 167 N. Y. S. 397.

81. **Municipal Corporations — Nuisance.**—Though curb boxes, when in proper repair and located outside of sidewalk, are not nuisances per se, they may become so because of their defective condition and situation therein.—*Corbin v. City of Huntington*, W. Va., 94 S. E. 38.

82.—**Nuisance.**—A city does not have the power to declare in advance that a proposed milk depot at which horses shall be stabled is a nuisance or to forbid the erection of the necessary buildings.—*People v. City of Chicago*, Ill., 117 N. E. 779.

83.—**Ordinance.**—City ordinance, prohibiting operation of stockyards and certain other business without a permit, but which does not prescribe any conditions with which an applicant must comply, or which govern the board, is arbitrary and invalid.—*City of Richmond v. House*, Ky., 193 S. W. 218.

84.—**Proximate Cause.**—Negligence of servant driving defendant's automobile in not stopping after blowout in time to have prevented release of locking rings from wheel, one of which struck pedestrian, was proximate cause of injury, though precise form in which negligence would probably cause harm could not have been foreseen.—*Regan v. Cummings*, Mass., 117 N. E. 800.

85.—**Repair of Streets.**—Paving contract to maintain pavement for period of 10 years, and to make all repairs that may become necessary through ordinary wear, or from natural causes, etc., did not require contractor to repair defects caused, or possibly caused, by tearing up or tunneling by other contractors to put in pipes.—*City of Troy v. Fidelity & Deposit Co. of Maryland*, N. Y., 167 N. Y. S. 338.

86.—**Vacating Alley.**—In an action involving an alley, in which it was stipulated that at the time of an attempted vacation the city had six aldermen, the vacation will be held void where it appeared only four aldermen voted for the vacation, under the statute requiring a three-fourths majority.—*Rollo v. Pool*, Ill., 117 N. E. 756.

87. **Negligence—Notice of Defect.**—Whether owner of building had notice of defective condition of step in vestibule was immaterial on question of owner's liability to member of public injured thereby.—*Hommel v. Badger State Inv. Co.*, Wis., 165 N. W. 20.

88. **Nuisance—Odors and Noise.**—Although stockyards may become nuisance, being in partial residence district within 20 feet of church, injunction will not lie to prevent it, where it is not shown that noise or odor has caused any discomfort or ill effects, and apprehended injury is doubtful.—*City of Richmond v. House*, Ky., 193 S. W. 218.

89. **Partnership—Accounting.**—In suit by one partner against another for half of cost of partnership equipment furnished by plaintiff

under agreement for reimbursement, decree allowing such recovery before ascertainment of firm's liability and final settlement of its accounts was error.—*Jones v. Rose*, W. Va., 91 S. E. 41.

90. **Principal and Agent—Breach of Contract.**—Defendant's failure to pay plaintiff's wages and expenses in soliciting oil leases, whereby she ran out of funds and had to return to her home, held a sufficient breach to justify plaintiff in refusing to further perform.—*Hughes v. Bibby*, Mo., 198 S. W. 179.

91.—**Architect.**—It was not within authority of architect employed by owner of building under construction to waive provision of contract that, if any extra work was required, a price for same must be agreed upon and approved in writing by architect before such work was begun.—*Burns v. Thorndike*, Mass., 117 N. E. 799.

92. **Sales—Failure of Consideration.**—Where purchaser, notwithstanding his full, actual knowledge of defects in articles sold to him, deliberately promises in writing to pay therefor, he cannot thereafter set up a plea of failure of consideration based upon such defects.—*Shores-Mueller Co. v. Bell*, Ga., 94 S. E. 83.

93. **Trover and Conversion—Bond in Replevin.**—Where carrier, with whom sheriff left replevined property, turned it over to plaintiff, in replevin, and defendant, having given bond, therupon sued in trover, tendering the issue of title, which was resolved against him, the defendant in trover was not liable, since the bond given by defendant in replevin did not confer title, but at most mere right of temporary possession.—*Abasi Bros. v. Louisville & N. R. Co.*, Miss., 76 So. 665.

94.—**Damages.**—Where, after his title was quieted against claim of plaintiff, defendant, without objection, took from plaintiff's possession crops received by her as rent from land, defendant was not guilty of conversion of such crops, for, being entitled to the land, he was entitled to the rents.—*West v. West*, Ark., 14 S. W. 282.

95.—**True Owner.**—Railroad receiving goods for carriage from one whose possession is apparently rightful will not be liable as for conversion in action by true owner, unless latter before goods are delivered demands them or gives notice of its rights thereto, and his intention to enforce it.—*Atlantic Coast Line R. Co. v. Nellwood Lumber Co.*, Ga., 94 S. E. 86.

96. **Warehousemen—Burden of Proof.**—Where safety deposit company leased a box to plaintiff, who deposited therein money, and it was lost without her opening the box, the presumption arises that the loss was due to the company's negligence, and it has the burden of showing that it exercised due care.—*Schaefer v. Washington Safety Deposit Co.*, Ill., 117 N. E. 781.

97. **Wills—Construction.**—Where testator devises part of his estate to his wife during widowhood, with remainder to his "living children," directs balance of his estate to be divided among his "living children," children living at his death, but predeceasing his wife, are included in class, and expiration of wife's interest properly fixes time for distribution.—*Taylor v. Taylor*, N. C., 94 S. E. 7.

98.—**Mutual Wills.**—Joint or mutual wills for benefit of survivor constitute a single will and upon death of the first of the parties the will has no further existence as will of survivor in absence of gifts to third persons.—*Anderson v. Anderson*, Ia., 164 N. W. 1042.

99.—**Residuary Estate.**—Where a residuary estate is devised to the executor in trust, but the testator fails to designate the beneficiaries of the trust, it will be treated as intestate property, and disposed of as if no will had been made.—*Thomas v. Anderson*, U. S. C. C. A., 245 Fed. 612.

100. **Work and Labor—Substantial Performance.**—Where a contractor, who agreed to build an iron stairway, substantially completed it, but failed to prove either the importance of the omission or the expense of supplying it, he could not have verdict for the full contract price.—*Gens v. Tuscany Realty Co.*, N. Y., 166 N. Y. S. 1076.

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THE LAWYER'S DUTY AND POTENTIAL POWER.

The American Bar Association, after due consideration of economic and other conditions, believes it to be necessary that the compensation of Federal Judges should be increased to a living wage. This conclusion should not be merely persuasive with Congress, but should be binding. It is desired to give utterance to some sentiments inspired by this conviction.

Both for the good of the bar and the welfare of the nation, when the great organized American bar unanimously reaches a conclusion upon a governmental policy concerning the administration of justice its voice should be heard in legislative halls, both federal and state. It is possible in practice to make a condition, instead of a theory, of that sentiment. The program for achievement involves two phases.

The first is a wholesome co-operation by the lawyers in spirit and in deed as to all fixed American Bar Association policies. By this is meant a disciplined spirit enthusiastically ready to accept the majority opinion and to zealously labor for it; a sinking of the personal equation in the general welfare and a patriotic, earnest, unselfish desire to serve the nation's best interest, under the direction of the committee selected to guide the particular campaign, and to serve upon those committees when drafted. If the lawyers desire a concrete example for conviction or inspiration, let them look upon the conscious power of the small percentage of working men represented by organized labor. Some introspection and less analysis will furnish a solution of the one weakness of the American lawyers as a distinct profession.

The second is the detailed application of organized power. When a recommendation of the Bar Association has been respectfully made to a legislative body it should be

promptly carried to the people. Every lawyer should convert himself into a committee of one to make vocal the views of the organized lawyers and their mature recommendations. Upon every platform and in the daily press he should patiently explain their necessity and their merits and request, and give cogent reasons for a popular support. Lawyers have either been taking too much for granted or have been guilty of censurable indifference. If the lawyers need a concrete example, for conviction or inspiration as to this suggestion, let them consider the speaking tours of America's great War President, whose power is but the reflected will of the people of his country to whom he personally explains his policies. Public sentiment crystallizes under his compelling personality, magic earnestness and deep conviction.

Are the lawyers justified in exercising this great power? For their organized effort has the promise of being equally irresistible. An answer will be made with another question. Are the lawyers worthy and capable of advising the people? In their most sacred concerns the lawyer guides his clients. From the cradle to the grave, lawyers are ever necessary and present with the individual. Why should they not be with the whole nation of individuals? But there is another reason.

The lawyer, alone, whether judge or practitioner, is the expert in the administration of justice. He alone is responsible for its effectiveness. In the history of this country, from the very nature of things, no legislator has ever suffered because of an unsatisfactory conduct of the courts. If a concrete example, for conviction or inspiration be necessary, it is found in the factory. Is the board of directors held responsible for the effective operation of the machinery? It is the engineer and his associates. Do the directors of an expert plan, select and install the mechanical plant? It is the expert.

But there are two other and higher thoughts—thoughts that reach down into

the innermost soul of the lawyer, whose life is consecrated to his noble profession and who possesses an understanding of its splendid spirit. One is a threat, but the other is a promise.

If the lawyers do not advance in the regard and esteem of the people they will recede in character and quality. With them, as well as with all elements in creation, it is progression or regression. Progression means initiating and defending constructive measures in the interest of justice. If an example be needed, let them read and reflect upon the sarcasm of the soulful "Blind Poet." If Milton had performed no other service, mankind is his everlasting debtor for placing before the eyes of the English lawyers the satirical picture of their miserabilism in the days of their weakness. The dull soul of an indigent or avaricious bar ceased to "ground their purposes on the prudent or heavenly contemplation of justice and equity, which was never taught them, but on the promising and pleasing thoughts of litigious terms, fat contentions and flowing fees." It will be helpful to turn from this sombre history to one of inspiration. To-day none are so honored, esteemed and respected of all their people as are England's lawyers, and to-day, England is a great, militant and cultured nation of brave men.

But, let our retrospection take a nobler and more unselfish turn. It is the call of duty, of opportunity, of the need of the people of their trained and mature minds in governmental concerns, no less than in individual enterprises, from which the true inspiration for progress and militancy should come. Faithful soldiers of the blind Goddess of Justice, their first duty is in shielding her sacred shrine, mindful ever of Webster's call to his brethren, that "Justice is the chief interest of man on earth." And, in the words of Milton, may it be said of the lawyers, "Unmoved, unshaken, unsewed, unterrified, his loyalty he kept, his love, his zeal."

T. W. S.

NOTES OF IMPORTANT DECISIONS.

INCOME TAX—STOCK ISSUED ON ACCOUNT OF INCREASED VALUE OF ASSETS NOT TAXABLE AS INCOME.—A letter of the Commissioner of Internal Revenue to Messrs. Haff, Meservy, German & Michaels, of Kansas City, construes the application of the income tax to an oil company whose property greatly increased in value by the discovery of additional oil sands. The company decided to capitalize this increased value by declaring a stock dividend, which the Commissioner rules it not taxable as income. The Commissioner says:

"Your attention is invited to § 31, added to the Act of September 8, 1916, by § 1211, Act of October 3, 1917.

"In accordance with the provisions of this section, all dividends, whether in stock or in cash, representing a distribution of earnings or profits accrued since March 1, 1913, constitute taxable income in the hands of the recipient shareholders.

"You are informed that where a corporation enters upon its books an estimated increase in the value of corporate property and assets, and capitalizes such an item by an issue of additional stock distributed as a dividend to its shareholders, the office holds that neither the entry of the item of increased value on the books of the corporation nor the receipt of the dividends by the shareholders represents an accumulation of profit or a receipt of income subject to tax."

"The Supreme Court of the United States on Jan. 7, 1918, in the case of *Towne v. Eisner*, held stock dividends not to be taxable income."

ESTOPPEL—WITHDRAWAL BY INDEMNITY COMPANY FROM DEFENSE OF ASSURED.—By decision in Minnesota the rule has become established that the control of defense in a suit by an employee against one insured as to recovery for accident gives to such employee a right of action against insurer. *Patterson v. Adan*, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184.

Somewhat analogous to this theory is a ruling by Illinois Supreme Court, that the measure of recovery against an indemnity company is not limited by the amount in its policy for the benefit of assured, where the company insists upon taking an appeal, and the judgment exceeding the amount of the policy is affirmed. 86 Cent. L. J. 2. This Court held that the situation justifies taxing interest on the policy's amount to final judgment against the company.

The Minnesota theory is extended in a case decided by its Supreme Court, where an in-

demnity company undertook to defend, but, because of a dispute with assured whom the company charged with seeking to aid plaintiff in a suit for recovery in a case covered by the policy, notified it it would not participate in the trial and, in fact, left it to the assured to conduct its own defense. By agreement with the plaintiff in the former suit, the insolvent assured sued the indemnity company with the employee to take proceeds of the recovery, if any. Standard Printing Co. v. Fidelity & Deposit Co., 164 N. W. 1022.

The Court said: "Defendant contends that by withdrawing from the defense of the action after it had once assumed the defense, it took itself out of the rule of the Adan case. The jury found that the conduct of defendant in withdrawing from the defense was unwarranted. Our opinion is that when defendant once assumed the defense of the personal injury action, it made an election that was irrevocable except for cause, and that defendant could not by any unwarranted conduct on its part place itself in a better position than it would have been had it gone ahead with the defense it had once assumed."

Had the Adan case held that the right, under contract, to control the defense and not the actual exercise of such right, made the indemnity company liable to the judgment creditor in a personal injury action, the question of estoppel would not come in at all. But when the exercise of the right creates the liability to such a creditor, we think this means a substantial exercise of such right. Here there was no participation in the trial at all. There was preliminary investigation and retirement from the case. The plaintiff in the personal injury action was not interfered with in any way.

But, if the assured had any right to recover on its own account, it would seem it had the right to make an assignment of its right of action to a third party, and the arrangement it makes might be deemed equivalent to an assignment. In that event, it could make no difference whether the assignee came under the ruling in the Adan case or not.

PUBLIC POLICY—RECOVERY BY PLAINTIFF NOTWITHSTANDING PARTICIPATION IN FRAUD.—Monroe v. Smith, 165 N. W. 532, decided by South Dakota Supreme Court, was ruled upon the theory that though parties be *in pari delicto*, yet the principle that courts will leave them as they find them, admits an exception quite elastic in its nature.

Thus in the above case it appears that a newspaper concern conducted a campaign to

procure subscriptions by the giving of an automobile as a prize to one attaining the greatest number. As the campaign progressed and was nearing its close, two contestants were leading. The manager of the contest went to the father of one of them and told him that unless he put up \$700 for his daughter her adversary would win. He put up \$500 with the understanding that if it landed the prize the manager was to retain the money, but if she lost it was to be returned to him. Then the manager went to the husband of the other party and told him that the former party had put up \$600, and for his wife to win it was necessary to put up \$450. This he did and secured the prize on final count of the votes. The manager returned the \$500 as agreed. The husband of the winner sued to recover the \$450. This was necessary as against the \$500 provisionaly put up, but unnecessary had no votes been counted in consideration of such sum. All other contestants were beaten independently of this fraudulent arrangement.

The action was dismissed by the trial court because the agreement was a fraud as against all the other contestants and payment of the \$450 being unnecessary to protect the interest of the winning contestant, it was money voluntarily paid in perpetration of a fraudulent scheme. This dismissal the Supreme Court reverses.

The Court said: "A judgment requiring defendant to refund the money paid by Monroe will tend to frustrate the commission of fraud in similar future contests, because it will deter organizations and managers of such contests from tempting contestants to enter into like dishonest schemes. Public policy will be better served by giving notice to the originator and managers of contests that such contests, although legitimate in themselves and in aid of honest business, must be honestly conducted, and that they shall not profit by working upon the cupidity of dishonest contestants. We are therefore of the opinion that upon the evidence plaintiff was entitled to a recovery."

Two well known cases are cited in support of this ruling. Stuart v. Wright, 147 Fed. 321, 77 C. C. A. 499; Hobbs v. Boatright, 195 Mo. 693, 93 S. A. 934, 5, L. R. A. (N. S.) 906, 113 Am. St. Rep. 709. These were horse racing cases where the entire scheme was illegal in its purpose and presented a clearer case of victimizing than the instant case does, which is of an unlawful arrangement within a transaction lawful in its general features. We doubt very greatly whether they support an exception to the rule invoked.

STATE QUARANTINE LAWS AND
REGULATIONS—VALIDITY OF AS
APPLIED TO INTERSTATE COM-
MERCE.

In Hannibal, etc., R. Co. v. Husen,¹ plaintiff had recovered damages resulting from the communication of Texas fever to his cattle by cattle conveyed into Missouri in violation of the Missouri statute which prohibited the bringing into the State of Texas Mexican or Indian cattle during eight months of the year. This statute was held to be a burden upon interstate commerce and unconstitutional, in that it went beyond what was necessary for the protection of the state.

In Missouri, K. & T. Ry. Co. v. Haber,² the action was brought to recover damages by reason of the communication of Texas fever to plaintiff's cattle by cattle brought into the state by the railroad company. The action was based upon a Kansas statute which provided that it should be a misdemeanor for any person between February 1 and December 1 of any year to bring into the state any cattle capable of communicating Texas fever; that any person violating the act should be liable to the person injured by the communication of said disease, and that proof that the cattle were brought into the state from south of the 37th parallel should be taken as *prima facie* evidence that the act had been knowingly violated (with an exception not necessary to state). Defendant claimed that the state statute was a burden upon interstate commerce and that Congress had so acted upon the subject matter as to nullify the state legislation.

The federal act (of May 29, 1884) provided for the establishment of a Bureau of Animal Industry, charged with the duty, under the instruction of the Commissioner of Agriculture, of investigating and reporting upon (among other things) the meth-

ods of suppressing and preventing the communication of animal disease. The Commissioner of Agriculture was further required to prepare rules for the suppression, etc., of such disease and certify same to the state governors and invite their co-operation and when the state and federal authorities should agree upon plans and methods in the premises, the Commissioner of Agriculture was authorized to expend money appropriated by the act in taking such quarantine measures as might be necessary. It was further provided that no railroad company should transport in interstate commerce any live stock affected with communicable disease and that no person should knowingly deliver such live stock to any railroad company.

The Supreme Court upheld the statute. It said (p. 623):

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

Further (after referring to the scope of the federal act) (p. 623):

"The act of Congress did not assume to give any corporation, company or person the *affirmative* right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases. On the contrary it was made a misdemeanor to deliver for transportation or to transport or drive from one State to another, cattle known to be affected with contagious, infectious or communicable diseases."

And the court went on to point out that the federal act did not deal with any question of civil liability for causing damage to the owners of domestic cattle by the in-

(1) 95 U. S. 465.
(2) 169 U. S. 613.

tribution of cattle under circumstances which would violate the state statute and that neither the federal act nor any regulations established thereunder undertook to give any protection from such liability.

The cattle had been received by the initial carrier at a point outside the "infected district" as defined by the federal authorities but were by defendant carried through such district. The court said that the federal regulations may have been fully complied with but that even so no protection was afforded against the liability imposed by state law, which was in aid of the objects which Congress had in view when it passed the Animal Industry Act.

The court discussed the Husen case, *supra*, saying that the statute in that case was condemned because it went beyond the necessities of the case, while in the instant case the statute was passed by the State within the limits of what was needed for self protection, not excluding all Texas cattle but merely imposing a responsibility in damages upon one bringing in such cattle if it communicated disease. Further on the court carefully pointed out that it construed the state statute as not imposing liability if the defendant could show that he did not know that the cattle were liable to impart diseases and could not by the exercise of diligence have discovered it.

In *Rasmussen v. Idaho*,³ Rasmussen was convicted under a statute of Idaho and proclamation of the Governor. The statute required the Governor whenever he should believe that scab or any other infectious disease of sheep existed in any other state to designate such localities and prohibit the importation into Idaho of sheep from such places except under such restrictions as he might deem proper. The Governor accordingly issued a proclamation forbidding for 60 days the importation of sheep from certain designated territory in Utah

and Nevada. The court upheld the conviction as against the contention that the authority therefor violated the Commerce Clause. It found the statute and proclamation to be reasonable and not subject to the objections which had led to the condemnation of the state statute in the Husen case, the Idaho statute authorizing the embargo only after investigation and the Governor having in his proclamation acted upon reasonable grounds and gone only so far as the defense of Idaho's sheep industry reasonably required. No question of federal legislation was discussed or (apparently) involved.

In *Reid v. Colorado*,⁴ Reid was convicted under a Colorado statute which provided that it should be unlawful for any person to bring into the State any cattle or horses from a State or country south of the 36th parallel unless such cattle or horses had been held north thereof for 90 days previous to their importation into the State or unless a certificate had first been secured from the state authorities. Reid had secured a certificate from a federal inspector but had ignored and violated the state requirements.

The case involved the same provisions of the federal law (act of May 29, 1884) as have been noted in the discussion of the *Haber* case.⁵ The Supreme Court affirmed the state court's decision upholding the conviction. It declared that any rule which Congress made was paramount and that when "the entire subject of the transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not," but the court declared that "Congress has not by any statute covered the whole

(4) 187 U. S. 137.

(5) *Supra*.

subject of the transportation of live stock among the several states and except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious and communicable diseases."

In support of this view, the court took up the provisions of the federal act and construed them as not evidencing any intention to prevent the state from taking measures to protect their live stock industry. In discussing these matters the court remarked (p. 148) :

"It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'

Referring to the provision of the federal law prohibiting any person from transporting any cattle in interstate commerce *known* to be affected with communicable disease, the court pointed out that this did not cover the entire subject of transporting diseased cattle in interstate commerce and left the state free to adopt and enforce further precautions of a reasonable nature such as were contained in the Colorado statute.

In *Asbell v. Kansas*,⁶ Asbell was convicted of the violation of a Kansas statute prohibiting any person from transporting into the state cattle from any point south of the south line of the state, except for immediate slaughter, without having first caused them to be inspected by the state or federal authorities. This case brings in the

federal statutes of February 2, 1903,⁷ and of March 3, 1905.⁸ The court declared (Mr. Justice Moody delivering the unanimous opinion of the court) that the only parts of the said acts that need be considered were the provisions of the act of 1903. The decision (affirming the state court) will be made clear by a quotation from the opinion (pp. 257-8) :

"In that law (of 1903) it is enacted that when an inspector of the Bureau of Animal Industry has issued a certificate that he has inspected cattle or live stock and found them free from infectious, contagious or communicable disease, 'such animals so inspected and certified may be shipped, driven, or transported * * * into * * * any State or territory * * * without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture.' There can be no doubt that this is the supreme law, and if the state law conflicts with it the state law must yield. But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with the national law. Rule 13, issued by the Secretary of Agriculture under the authority of the statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined States, which is not this case, and that in terms it recognizes restrictions imposed by the State destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none."

The decision in this case was made in the face of the provisions of the federal law which are now to be mentioned (and which are still in force).

1. Act of 1903.—An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of

(7) 32 Stat. 791, 10 Fed. Stat. Anno., p. 84.

(8) 33 Stat. 1204, 10 Fed. Stat. Anno., p. 35.

Contagious and Infectious Diseases of Live Stock, and for Other Purposes.⁹

Section 1 confers upon the Secretary of Agriculture the powers which had been vested in the Secretary of the Treasury by sections 4 and 5 of the Act of May 29, 1884 ("to be exercised exclusively by him") in order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuro-pneumonia, foot and mouth disease, and other dangerous, contagious, infectious, and communicable diseases in cattle and other live stock, and to prevent the spread of such diseases. This section authorizes and directs the Secretary from time to time to establish such rules and regulations concerning the exportation and transportation of live stock from any place where he has reason to believe such diseases may exist into other states, etc., as he may deem necessary, and provides that such regulations shall have the force of law. It further provides that when any federal inspector shall issue a certificate that any cattle or other live stock have been inspected and found free from disease, such animals may be transported in interstate commerce without further inspection or the exaction of fees of any kind, except such as may at any time be ordered or exacted by the Secretary of Agriculture; and all such animals shall at all times be under the control and supervision of the Bureau of Animal Industry of the Agricultural Department for the purposes of such inspection.

Section 2 authorizes the Secretary to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of animal diseases from foreign countries, into the United States or from one state to another, and to seize and quarantine any hay, etc., or any hides, animal products, etc., coming from foreign country into the United States or from one state to another whenever he

deems advisable in order to guard against or suppress contagion.

2. Act of March 3, 1905.—An Act to Enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes.¹⁰

Section 1 authorizes and directs the Secretary to establish quarantine district and to notify carriers of and publish information as to same.

Section 2 prohibits railroad companies, etc., from receiving or transporting, persons from delivering to them, and persons from driving or transporting in private conveyance from state to state from any quarantined area, any live stock except as provided in the subsequent sections.

Section 3 requires the Secretary to make rules which shall permit and govern the inspection, disinfection, certification, treatment, handling, and method and manner of delivery and shipment of cattle or other live stock in interstate commerce from quarantined territory.

Section 4 provides that live stock may be moved from quarantined territory into another state under and in compliance with the regulations of the Secretary made under section 3 of the Act and prohibits any such movement of live stock in interstate commerce from quarantined areas "in manner or method or under conditions other than those prescribed by the Secretary."

Rule 13, referred to in the Asbell case, was as follows:

"Rule 13. From the 1st day of February to the 31st day of October inclusive of each year, no cattle shall be transported or driven or allowed to drift from the area quarantined by the Secretary of Agriculture for splenic fever into any State or Territory or District of Columbia or portion thereof outside of the said quarantined area, except as hereinafter provided. During the

(9) 10 Fed. Stat. Anno., p. 34.

(10) 10 Fed. Stat. Anno., p. 35.

months of January, November and December of each year cattle from the area quarantined by the Secretary of Agriculture for splenic fever may be shipped without restrictions, other than those imposed by state or territorial officers at point of destination."

The Asbell case is direct authority for the proposition that the test is whether the state action actually conflicts with or obstructs the affirmative exercise by Congress of the powers of Congress on the subject and the action of the federal authorities authorized thereby. The state is allowed to supplement the federal laws and regulations and impose additional restrictions and requirements, in the absence of express federal prohibition. This view is supported by the case of *Savage v. Jones*, to be discussed.

The Asbell case decides that notwithstanding the fact that Congress has imposed upon the Secretary of Agriculture the duty of keeping informed of his stock conditions so far as disease is concerned, and not only authorizes but requires him to establish rules and adopt measures to prevent the communication of disease, yet that Congress has not by enacting these provisions taken possession of the entire subject matter so as to exclude the state; that, notwithstanding the Secretary, under the authority of the federal statutes, may have established certain quarantine districts and made rules regulating the transportation of animals, etc., therefrom (in interstate commerce), the state may decide that territory not covered by the federal quarantine shall be quarantined so far as the state is concerned. (I am, of course, assuming that any state law or regulation is not condemned by the doctrine of the Husen case as being arbitrary and palpably unnecessary.) Under the doctrine of this Asbell case, the state may decide that the Secretary of Agriculture has not made rules or adopted measures which will not protect it and may therefore make its own rules and adopt its own measures; or may reach the

conclusion that the federal quarantine is not sufficiently extensive, and establish for itself additional territory which shall be considered quarantined.

What are the limits of the state's power (still assuming that the state's action is not to be condemned as arbitrary *per se*)?

If a federal inspector gives a certificate as referred to in section 1 of this Act of 1903, the state cannot prevent the introduction of the live stock or require any other inspection, because the federal act expressly says that such live stock may move without any further inspection. See the Asbell case, p. 258.

If the federal authorities under the Act of 1905 establish a quarantined area and make regulations under which live stock may move therefrom the state cannot, *as to live stock from such quarantined territory*, prohibit the importation or impose other conditions, because section 4 of the said act expressly says that such live stock may move from such quarantined territory under the regulations of the federal authorities and in no other manner.

Under the authorization of the Act of 1903, the Secretary may and is required to adopt such measures as he deems proper to prevent and suppress contagion. As we have seen, this does not prevent the state from regulating the subject matter, so long as the federal Secretary has not taken charge of the specific matter which the state is acting upon.¹¹ But the question arises, is the secretary's power limited to affirmative regulations and measures operating on the subject matter, or can he affirmatively sanction movements under his regulations or officially declare that his rules or methods are intended to cover the subject matter and are exclusive? If the federal acts confer such power upon him and he exercises it, then the power of the state is abrogated and

(11) *Reid case; Asbell case*. See also *Missouri Pacific R. Co. v. Larabee Mills*, 221 U. S. 612.

annulled. Can he, for example, say that the quarantine he has established is sufficient to prevent danger and that live stock may move from territory without such quarantined area without restriction of any sort? There is ground for the view that he cannot thus exclude state action in view of the decision holding that Congress did not intend to prevent state action additional to the federal measures, save in the instances where the federal acts affirmatively authorize movement under federal regulations. The Asbell opinion, however, makes a point of the fact that the regulation of the secretary "in terms recognizes instructions imposed by the state of destination."

The recent decision in *Savage v. Jones*,¹² is interesting in connection with the subject of these notes. The question involved in this case was whether or not an Indiana Statute violated the Commerce Clause which prohibited the sale in Indiana of feeding stuff unless there should be first filed with the State Chemist a certificate showing among other things the ingredients which the article contained and unless a label showing the analysis of the article should be affixed to the package and an inspection tax paid. The court declared that the purpose of the statute was to "prevent fraud and imposition in the sale of food for domestic animals" and that the object of the Food and Drugs Act (of June 30, 1906, 34 Stat. 768) was to prevent adulteration and misbranding. It pointed out that in the enumeration of the acts which would constitute a violation of the federal act Congress had not included the failure to disclose ingredients (save in specific instances, as where opium was present). The court defines the scope of the federal act as follows (pp. 531-2) :

"It is provided that the article 'for the purposes of this act' shall be deemed to be misbranded if the package or label bear any statement, design or device regarding

it or the ingredients or substances it contains, which shall be false or misleading. (Section 8). But this does not cover the entire ground. It is one thing to make a false or misleading statement regarding the article or its ingredients, and it may be quite another to give no information as to what the ingredients are. As is well known, products may be sold, and in case of so-called proprietary articles frequently are sold, under trade names which do not reveal the ingredients of the composition and the proprietors refrain from revealing them. Moreover, in defining what shall be adulteration or misbranding for the purposes of the federal act, it is provided that mixtures or compounds known as articles of food under their own distinctive names, not taking or imitating the distinctive name of another article, which do not contain 'any added poisonous or deleterious ingredients' shall not be deemed to be adulterated or misbranded if the name be accompanied on the same label or brand with a statement of the place of manufacture."

The court goes on to say that Congress "has thus limited the scope of its prohibitions. It has not included that at which the Indiana statute aims." It shows that Congress has not in the statute expressly denied the power of the state to "permit imposition upon the public by making a reasonable and non-discriminatory provision for the disclosure of ingredients, and for inspection and analysis."

In answering (in the negative) the question whether any such denial is implied, the court remarks (p. 533) :

"But the intent to supersede the exercise by the State of its police power as to matters not covered by the federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulations and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

The court proceeds to discuss the *Haber*, *Reid*, and *Asbell* cases in support of its decision. It also cites *Northern Pacific Ry. Co. v. Washington*,¹³ (Hours of Service

(12) 225 U. S. 501.

(13) 222 U. S. 370.

case), but does not undertake to reconcile it. It is interesting to compare the foregoing quotation from the Savage case with the following from the Southern Ry Co. v. Indiana (February 23, 1913):

"The test, however, is not whether the state regulation is in conflict with the details of the federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

See also the New York "Hours of Service" case;¹⁴ and the Quarantine case.¹⁵

JOHN K. GRAVES.
Washington, D. C.

(14) Erie R. Co. v. New York, 233 U. S. 671.

(15) Chicago, Burlington & Quincy R. Co. v. Frye-Bruhn Co. (C. C. A., 8th Circuit), 184 Fed. 15, 20-22.

NEGLIGENCE—LAST CLEAR CHANCE.

AIKEN v. METCALF.

Supreme Court of Vermont. Oct. 16, 1917.

102 Atl. 330.

An instruction that although plaintiff was negligent in attempting to cross the street if defendant driver of the automobile by looking would have discovered plaintiff and been able to avoid him, plaintiff was entitled to recover was properly refused; the last clear chance doctrine not being applicable where the negligence of plaintiff is concurrent with that of defendant.

MILES, J. This is an action to recover damages for an alleged injury to the plaintiff, occasioned by the defendant's negligence in operating an automobile. The injury occurred on a street in the village of Irasburg, running northerly and southerly along the easterly side of the common, in that village. At the time of the injury, the plaintiff was crossing the street diagonally on foot in a northwesterly direction, intending to cross the common in a beaten path used for that purpose, and when struck by defendant's car was west of the center of the street, which was from 25 to 35 feet wide. Just before the accident, the plaintiff came out of a store on the east side of the street, looked north

and south, saw no team, auto, or person in the street, traveled northerly on the sidewalk or platform of the store about 50 or 60 feet, and then started to cross the street as stated above, and in doing so looked neither to the north or south for approaching teams or autos, except only so far as he could see without turning his head. Just before the accident, the defendant was on the westerly side of the common, and in coming onto the street on the easterly side of the common, he first went south to the southwesterly corner of the common, then turning easterly came to the southeasterly corner of the common, where he turned northerly onto the street in which the accident occurred, about 200 feet south of where the plaintiff attempted to cross it. As he came onto that street, there was nothing to prevent his seeing the plaintiff while attempting to cross the street, if he had looked. He admitted that he did not blow the horn or give any signal, in making the sharp turns at the southwest and southeast corners of the common, and did not see the plaintiff until just before the collision, and not in season to avoid it. The plaintiff's testimony tended to show that he did not see the automobile until about the time he was struck by it, and not in time to avoid it. The case was tried by jury, and verdict and judgment were rendered for the defendant. Only two exceptions were reserved by the plaintiff, the first of which was a request to charge as follows:

"If you find the plaintiff was negligent in attempting to cross the street at the time he did, and you find the defendant, had he been looking, would have discovered the plaintiff when he had reached a place of danger and had been able to avoid him, then the plaintiff would be entitled to recover."

—which the court refused. The plaintiff based this exception upon the "last clear chance" rule and upon no other ground. There is more or less confusion, if not conflict, in the treatment of this subject by the courts in different jurisdictions; but this court is committed to the doctrine that the last clear chance rule cannot be invoked where the negligence of the plaintiff is concurrent with that of the defendant. The law on that subject, as recognized in this state, is well stated in French v. Grand Trunk Ry. Co., 76 Vt. 441, 58 Atl. 722, that when a traveler has reached a point where he cannot extricate himself and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition and not the proximate cause of the injury and will not preclude a recovery, but that it is equally true that if a traveler, when he reaches the point

of collision, is in a situation to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. The rule that, if the plaintiff's negligence proximately contributes to his own injury, he cannot recover is so well settled in this state that it needs no citation of authorities upon that point, and therefore the last clear chance rule can never apply where the plaintiff's negligence is concurrent with and of the same degree as that of the defendant. A charge as requested by the plaintiff would justify the jury in finding for him, though his negligence may have proximately contributed to his own injury. That the plaintiff cannot recover when his negligence is concurrent with and of the same degree as that of the defendant is also shown in *Trow v. Vt. Central R. R. Co.*, 24 Vt. 487, 58 Am. Dec. 191, in which the authorities upon that subject are collected and commented upon. The only case in this state in conflict with the rule laid down in *French v. Grand Trunk Ry. Co.*, supra, is *Willey v. B. & M. R. R.*, 72 Vt. 120, 47 Atl. 398. In that case *Trow v. Central Vt. R. R. Co.*, supra, is cited in support of the conclusions reached in the Willey Case; but, as we have seen, the Trow Case does not support the Willey Case. In the Willey Case the holding would permit a recovery when the negligence of the plaintiff was concurrent with that of the defendant. That case made the negligence of the defendant the controlling factor in the consideration of his liability, regardless of the plaintiff's negligence. In the French Case the court comments upon the Willey Case and, impliedly at least, overrules it. The Willey Case has never been relied upon by this court since it was promulgated as an authority for the law stated in the opinion. *French v. Grand Trunk R. R. Co.*, supra; *Flint's Adm'r v. Central Vt. Ry. Co.*, 82 Vt. 269, 73 Atl. 590. The Willey Case does not state the law as this court understands it; and, as it is sometimes referred to in briefs of attorneys, we take this occasion to expressly overrule it. There was no error in the court's refusal to charge as requested. The other exception of the plaintiff was as follows:

"The plaintiff excepts as to the charge of the court which eliminates the sounding of the horn as being a matter of negligence, because the plaintiff claims that the pathway across a highway and common was an intersection of the highway under the statute."

The plaintiff argues that this last exception is to the court's failure to charge respecting the defendant's neglect to sound the horn or

give any other signal before making the turn at the southeast corner of the common. The defendant argues that that question is not raised by the exception taken, and that the only exception saved by the plaintiff with respect to giving a signal is to the court's failure to charge that the path across the highway and common was an intersection of highways, and that it was the duty of the defendant to sound the horn on approaching that crossing. We think the exception taken was not to the court's failure to charge that it was the duty of the defendant to sound the horn on approaching the southeast corner of the common, but was to the court's failure to charge that it was the defendant's duty to sound the horn on approaching the pathway crossing. The reason stated as the ground of the exception shows that the exception related to the crossing and nothing else, and the court was justified in so understanding it.

There was no error in the court's omission to charge that the path across the highway and common was an intersection of highways within the meaning of the statute, and that it was the duty of the defendant to give a signal on approaching it; for it was not an intersection of highways, requiring the defendant to give a signal on approaching it.

Judgment affirmed.

Note.—Last Clear Chance Doctrine Where Duty to Look Would Have Avoided Injury.—The instant case declares that: "The rule, that, if the plaintiff's negligence proximately contributes to his own injury, he cannot recover is so well settled in this state that it needs no citation of authorities upon that point, and, therefore, the last clear chance rule can never apply where the plaintiff's negligence is concurrent with and of the same degree as that of defendant." The facts in the instant case show that defendant "did not see plaintiff until just before the collision and not in season to avoid it." And the requested, but refused, instruction, injected the thought that had defendant "been looking," he would have discovered the plaintiff in time to have avoided the collision. But the court ruled, practically, that the duty to look was not equivalent to actual discovery of plaintiff being in danger.

In *Ill. Cent. R. Co. v. Evans*, 170 Ky. 536, 186 S. W. 173, Kentucky Court of Appeals, said: "It is a familiar rule and often applied in the law of negligence, that, however much the negligence of the injured party may have contributed to his injuries, this will not excuse the person injuring him, if this person, after discovering his peril, could by the exercise of ordinary care could have avoided the injury." There seems so far no essential difference between the statements by these courts. But the Kentucky court went fur-

ther and declared that the effect of a warning to the engineer that a hand car on the track by plaintiff's negligence, devolved upon the engineer the duty to ascertain the negligent plaintiff's situation so as to prevent a collision.

It is to be conceded that in some circumstances there is no obligation to keep a lookout for persons in danger, as for example, trespassers on a railroad track. But even as to these if the trespasser were in a position where his perilous position could not help from being seen, defendant injuring him will be liable. Tenn. Central R. Co. v. Cook, 146 Ky. 372, 142 S. W. 683, citing a number of Kentucky cases.

In Becker v. L. & N. R. Co., 110 Ky. 474, 61 S. W. 997, 53 L. R. A. 267, 96 Am. St. Rep. 459, the opinion refers to Shearman & Redfield on Negligence, § 484, where the author in speaking of contributory negligence and last clear chance, said: "The defendant is responsible, not only for what he actually knows, but for what he is bound to know. It is clear that the frequent statement, that contributory negligence is an absolute bar to recovery, except where the defendant's conduct has been 'reckless,' 'wilful' or 'wanton,' or even grossly negligent, are not sound. No courts have in actual practice adhered to this imaginary rule. It has been explicitly overruled, and, indeed, it has been explained away or disavowed by courts which had previously acted on it."

The rule as stated by Michigan Supreme Court is that: "Contributory negligence of plaintiff may not prevent a recovery in a case where the defendant, who knows or ought to know of the precedent negligence of plaintiff, does him an injury." Davis v. Saginaw, etc., Ry. Co., Mich., 157 N. W. 390, citing Michigan cases.

In Nehring v. Connecticut Co., 86 Conn. 109, 84 Atl. 301, 45 L. R. A. (N. S.) 896, the Supreme Court of Errors reviewing the question quite fully of contributory negligence preventing recovery, held concurring negligence prevents recovery, yet upholds the principle, that if one placing himself in danger is struck by another when he might avoid striking him, this striking is open to the charge of being wilful and wanton, and therefore to be regarded as the proximate cause of the injury. The court then remarks that it has been speaking of cases where "actual knowledge on the part of the defendant of plaintiff's peril enters into the assumption of facts. Suppose, however, that such knowledge is not established, but facts are shown from which it is claimed that the defendant ought in the exercise of due care to have known of it? What shall be said of such a situation?"

It was said an engineer operating at a grade crossing is under duty to exercise caution and failure to do so produces like "effect as actual knowledge." And so "a motorman of a trolley car running in a highway, or a chauffeur driving an automobile is under a duty to be watchful for the protection of others which another man under other conditions would not owe to his fellows."

We think the reasoning in this supplies a rule which ought to be observed. If contributory or concurrent negligence places one in a situation of peril, then actual knowledge in time to avoid injuring him makes the act of defendant injur-

ing him the proximate cause thereof, and, if the defendant owed a duty such as is spoken of in the Nehring case, his lack of actual knowledge will not make him less the proximate cause of injury, for which recovery should be allowed under last clear chance rule. C.

BOOK REVIEW.

CORPUS JURIS, VOLS. 8-12.

Five volumes of Corpus Juris have appeared within the last year, to-wit: volumes 8 to 12 inclusive. The superior excellence of this set is being maintained steadily and it is certain to realize the most hopeful anticipation of those who have been looking for a careful scientific arrangement of the law of the United States.

The term "Corpus Juris" used in this connection does not represent accurately the conception of Justinian's monumental enterprise; it could not in the nature of things. No supervisory power exists anywhere in this country which can hammer out the differences and discrepancies between the laws of different states and by a simple edict make all laws uniform.

But so far as a scientific classification can bring order out of chaos and classify the general principles of the English common law, common to all the states, this new work may justly claim no inferior position to the great code produced under the supervision of Tribonian and his celebrated collaborators. Indeed, the present work performs perfectly the function of Justinian's Digest arranging the authorities and classifying the material. And, if it is not able, by a simple edict, to iron out all the curious wrinkles and anachronisms of American Statute law, it can, at least, classify the decisions construing different statutes and codes common to most of the states and by the very force of association tend to harmonize, by such construction, even the statute law of the various states.

Volumes 8 to 12 cover all the usual subjects of law included within the two subject headings—Bills and Notes and Constitutional Law inclusive. Volume 8, with the exception of a few minor subjects, is practically a treatise on Bills and Notes, a treatise covering 1108 large pages of small type, equivalent to double the number of pages of an ordinary law book. The subject is well treated both historically and

analytically. Part IV of the article, on "Codification by the Negotiable Instruments Law," is especially valuable. The author under the sub-title "Construction" emphasizes the importance of "following harmonious decisions of courts of other states" in order to carry out the purpose of uniformity of this act—which was the first of the notable series of uniform acts, prepared by the Commissioners on Uniform State Laws.

The principal topics in Volume 9 are Bonds, Brokers, Building Contracts, Burglary and Cancellation of Instruments. Volume 10, like Volume 8, is a treatise in itself; the entire volume covers the one subject, "Carriers." It takes 1239 pages to exhaust the very important topic of the law and the work is excellently done by two of the editorial staff, Wm. A. Martin and Henry H. Skyles.

By far the two most important topics in Volume 11 are Charities and Chattel Mortgages; the latter topic requiring nearly 400 pages for its treatment. No subject of the law is growing faster than that governing chattel mortgages and the increasing litigation involving construction of such mortgages shows the fluidity of the law on this subject.

Volume 12 treats several very important subjects: Commerce, in 158 pages; Compositions with Creditors in 55 pages; Conflict of Laws in 65 pages; Conspiracy in 120 pages and Constitutional Law in 650 pages. It will strike the ordinary lawyer as being somewhat unusual to find the great and growing subject of Conflict of Laws crammed into 65 pages when ten times that number of pages should hardly suffice for a proper treatment of this subject. In Continental countries this title ranks among the most important subjects of jurisprudence and the literature it has inspired would fill libraries. Anglo-Saxon jurisprudence has not yet awakened to the importance of the questions of law arising from the conflict of laws applicable to the persons or subject matter of litigation, and most text book writers still treat the subject very superficially. The present world conflict will doubtless, among other changes, produce a more friendly interest in the laws of other countries and a serious attempt to adjust the differences between laws in the interest of justice and the more perfect freedom of international intercourse.

The mechanical execution of these volumes like those gone before, represent the highest and best in the art of printing and publishing.

The volumes are printed on bible paper, bound in buckram and published by the American Law Book Company, New York.

HUMOR OF THE LAW.

Justice Alfred Page, of New York tells the following story:

"A resident of the Bowery took an accident insurance policy and then fell ill of pleurisy. He brought action against the insurance company and lost in the municipal court, which decided that pleurisy was not an accident, but a visitation of God. The superior court reversed the finding on the ground that a visitation of God to a resident of the Bowery was an accident."

A country lawyer was defending a prisoner who had killed a man by hitting him on the head with a brick. The case against the prisoner being quite clear, the counsel endeavored to get his client off by making a peroratio speech. He said: "The responsibility of defending my client is almost overwhelming. This morning, as I was walking in my garden enjoying the lovely sunshine and balmy air, listening to the birds singing, and looking at all the beautiful flowers, I said to myself, 'My poor client, immured in his cell, can see none of those things!'"

Just then a spectator at the back of the court shouted: "Neither can the man he hit on the head with a brick!"

They are telling this one, which may or may not be true, in the centers of civilization along the Eastern Seaboard.

A youth hired as an office boy by a New York concern was explaining to his employer the necessity of his having steady employment:

"You see," he said, "I have to help support my mother, because papa isn't with us any more."

"Is he dead?" asked the head of the concern sympathetically.

"No sir; he's not dead, but they've got him in jail."

"In jail! What for?"

"Well, sir, he used to work in a bank over in Jersey—and they accused him of taking samples home."

WEEKLY DIGEST

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1. **Animals—Contagious Disease.**—A livery stable keeper, who took defendant's mules into his stable, not knowing that they were affected with contagious disease, defendant having represented them to be sound, may recover for injuries to his own stock, which contracted disease.—Wood v. Hill, Ga., 94 S. E. 283.

2. **Adverse Possession—Landlord and Tenant.**—Where one rents land to another such tenancy is sufficient notice of adverse possession, although he never mentioned his claim to anyone.—Salinas v. Shaw, Tex., 198 S. W. 605.

3.—Sufficiency of.—An instrument called a bill of bargain and sale, naming the parties, reciting that one sold to the other certain lands, describing them, for one-half the merchantable fruit on the place, the grantee to furnish the grantor's wife board and lodging during her lifetime, under which the grantee went into possession and claimed adversely, was sufficient to constitute color of title.—Baber v. Baber, Va., 94 S. E. 209.

4. **Attorney and Client—Disbarment.**—Gen. St. 1915, § 486, directing Supreme Court to disbar attorney, convicted of felony or of a misdemeanor involving moral turpitude, does not apply to a conviction before a justice of the peace.—In re Anderson, Kan., 168 Pac. 868.

5.—**Misconduct—Disciplinary proceeding** against attorney for misconduct, on ground that, as required by federal equity rule No. 24 (198 Fed. xxiv, 115 C. C. A. xiv), he had signed petition in federal court in suit to establish

claims of heirs in land to which it had been adjudicated that they had no claim, in view of his belief in claim and the absence of fraud, dismissed.—In re Downes, N. Y., 167 N. Y. S. 588.

6.—**Relationship.**—Service of notice of motion upon plaintiff's attorney to assess damages upon an injunction bond, heard during the term in which the judgment dissolving the injunction was given, was sufficient, relation of attorney and client being presumed to exist until close of term.—Southern Surety Co. v. Young, Mo., 198 S. W. 476.

7. **Bankruptcy—Preference.**—Where bankrupt's trustee sued to set aside as preference assignment of accounts, it was not necessary to show that assignee believed preference was intended; trustee having shown preference as defined by Bankruptcy Act.—Abele v. Beacon Trust Co., Mass., 117 N. E. 833.

8. **Banks and Banking—Liability to Depositor.**—Where agent, in possession of check payable to principal's order, indorsed principal's name, without authority, and defendant bank gave him credit for it on account, and permitted him to exhaust his deposit, it was liable to principal for proceeds of check.—Hope Vacuum Cleaner Co. v. Commercial Nat. Bank of Independence, Kan., 168 Pac. 870.

9. **Bills and Notes—Attorney Fees.**—Where note provided for \$10 and 10 per cent of principal and interest as collection fee, it was not error to include stipulated attorney's fee in judgment; such stipulation not being within Rev. Laws 1910, §§ 974-976, declaring penalties and damages fixed by contracts void.—McClain v. Continental Supply Co., Okla., 168 Pac. 815.

10.—**Fraud and Misrepresentation.**—There can be no recovery upon notes in the hands of endorsee not bona fide holder, secured by fraud and misrepresentation.—Commercial Security Co. v. Main Street Pharmacy, N. C., 94 S. E. 298.

11. **Brokers—Sub-Contract.**—Where in a broker's office where defendant listed a house for sale a third party said in his presence he could furnish a buyer if the broker would split commissions, and the house was sold, such third party was not a partner of the broker, and settlement with him was not a settlement with the broker.—Home Securities Co. v. Todd, Iowa, 165 N. W. 204.

12. **Carriers of Goods—Negligence.**—Where a tank car was unloaded by removing a tap on a pipe in the bottom and opening a valve from the top of the tank, the railroad is not liable for loss of oil by reason of the valve being open when the top was removed at destination; the tank being filled by plaintiff.—Houston & T. C. R. Co. v. Oriental Oil Co., Tex., 198 S. W. 601.

13.—**Pleading and Practice.**—In action for loss of olive oil in transit, allegation of petition that "defendant wrongfully drew out the oil" did not throw upon plaintiff the burden of showing that the carrier itself drew out the oil, the petition counting on the carrier's common-law liability as an insurer.—Zerilli v. Ross, Mo., 198 S. W. 487.

14.—**Terminal Carrier.**—Where terminal carrier knew that shipper was unlikely to order disposition of shipment, its keeping of goods on

flat car at demurrage charge for 86 days was unreasonable, and after 26 days it should have unloaded goods and released car.—Northern Pac. Ry. Co. v. Pleasant River Granite Co., Me., 102 Atl. 298.

15. **Carriers of Passengers—Baggage.**—Pullman Company assumed duty to take care of passenger's baggage, and it was part of its duty and its porter's to restore such baggage to passenger in morning, porter having placed it in upper berth of passenger's section, or to account for it.—Palmer v. Pullman Co., N. Y., 167 N. Y. S. 610.

16.—**Gratuitous Passage.**—Passenger, paying no fare, injured by a sudden jerk of shuttle train operated by railway company to carry its employees to and from work, held not entitled under Civ. Code 1910, § 2175, to recover because persons were occasionally carried on train without payment of fare and none was demanded.—Carter v. Seaboard Air Line Ry., Ga., 94 S. E. 280.

17. **Charities—Wills.**—A will giving money to a county, the county to pay interest thereon at 4 per cent to a hospital, to be used for indigent patients, is technically a donation to the county, and the interest after payment is a trust, and is therefore within Acts 1912, c. 69, permitting a county "to accept donations and trusts made for benevolent and charitable objects."—Pirkey v. Grubb's Ex'r, Va., 94 S. E. 344.

18. **Chattel Mortgages—Fraud.**—Where plaintiff's agent sold guano to an illiterate person, and secured his mark to a note containing a mortgage on his crop, without informing him of the mortgage, there was such fraud as would relieve him of liability under mortgage.—Southern Fertilizer & Chemical Co. v. Carter, Ga., 94 S. E. 310.

19. **Commerce—Bill of Lading.**—Where bill of lading shows routing to be outside of state, though points of origin and destination are within state, shipment is interstate, governed by Carmack Amendment.—Illinois Cent. R. Co. v. Rogers & Hurdle, Miss., 76 So. 686.

20.—**Employees.**—Employee in railroad machine shop pushing a carload of lumber loaded in state for the shop, but intended for building and repairing cars to be used partly in interstate traffic, was not engaged in interstate commerce within Workmen's Compensation Act, § 52.—Barnett v. Coal & Coke Ry. Co., W. Va., 94 S. E. 150.

21.—**Constitutional Law.**—Laws 1915, c. 283, requiring Public Utilities Commission to require interstate railroads to stop all passenger trains reasonable time at or near state line, undertakes to regulate interstate commerce in a matter already regulated by federal authority, and is unconstitutional.—State v. Dickinson, Kan., 168 Pac. 838.

22.—**Criminal Law.**—Defendant could not defeat a prosecution under Rev. St. 1909, § 651, for alleged illegal sale of colored oleomargarine, on the theory that it was engaged in interstate commerce in making the sale, where its warehouses were in East St. Louis, Ill., and it made the sale in St. Louis, Mo.—State v. Swift & Co., Mo., 198 S. W. 457.

23. **Contracts—Pleading and Practice.**—Plaintiff's petition alleging defendants' breach of contract, whereby he was to be paid \$1 per thousand feet for all lumber and ties cut from lands of defendants, and to have absolute control of operations of sawmills and disposition of lumber, held to state a cause of action.—Cochran v. Stephens, Ga., 94 S. E. 303.

24.—**Unilateral Contract.**—Agreement by defendant with G. his daughter's future husband, to pay money annually to the daughter held unilateral and not binding until the marriage, though G remained willing to marry—De Cicco v. Schweizer, N. Y., 117 N. E. 807.

25. **Corporations—By-Laws.**—By-laws to effect that all contracts, etc., should be signed by president "or secretary," contained no authority to secretary to indorse checks, testimony being uncontradicted that provision, with words "or secretary" stricken, were the by-laws of company.—McCabe Hanger Mfg. Co. v. Chelsea Exchange Bank, N. Y., 167 N. Y. S. 580.

26.—**Intervention.**—Where, on petition of trustee, who intervened in suit for injunction against corporation, mortgage was foreclosed, entire property sold, and proceeds distributed, stockholders, who were not creditors, cannot intervene, setting up a new cause of action against corporate directors for their misfeasance, etc., in office.—Central Bank & Trust Corp. v. Piedmont Portland Cement Co., Ga., 94 S. E. 308.

27.—**Promoter.**—Where promoter of corporation without authority conveyed property designed for corporation and purchase of which corporation ratified, purchaser stands in promoter's shoes, and corporation may recover property.—Lake Harriet State Bank v. Venie, Minn., 165 N. W. 225.

28. **Damages—Estimation of.**—The owner of an automobile used only for pleasure can recover no damages for the loss of the use of his car caused by defendant's negligence, there being no basis for ascertaining the damage.—Hunter v. Quaintance, Colo., 168 Pac. 918.

29. **Death—Pleading and Practice.**—Complaint alleging negligence in landlord's performance of contract to keep leased premises heated, causing the death of tenant, though based on contract, stated a cause of action for damages for tenant's death by wrongful act, within Gen. St. 1913, § 8175.—Keiper v. Anderson, Minn., 165 N. W. 237.

30. **Divorce—Alimony.**—Under terms of original judgment and decree of trial court, absence from the jurisdiction of wife to whom alimony had been awarded on a divorce, did not excuse husband from payments of installments of alimony falling due during her absence.—Stanfield v. Stanfield, Okla., 168 Pac. 912.

31.—**Contempt.**—Application to punish husband for contempt in failing to pay alimony pendente lite, awarded in wife's suit for separation, was not special proceeding but motion in action, and covered by previous orders of court fixing counsel fees husband was to pay for wife.—Turner v. Woolworth, N. Y., 117 N. E. 814.

32. **Electricity—Res Ipsa Loquitur.**—An electric company was *prima facie* negligent in having a dangerous current escape down a guy wire, which had no current breaker or insula-

tor, by reason of which plaintiff was injured.—*Faris v. Lawrence County Water, Light & Cold Storage Co., Mo.*, 198 S. W. 449.

23.—Warning.—Where deceased was warned not to get near wires, and told how to avoid them, and would not have been injured if he had heeded instructions, held, that there could be no recovery for his death.—*Murphy v. City of Charlotte, N. C.*, 94 S. E. 299.

34. **Eminent Domain—Condemnation Proceedings.**—Where mayor and councilmen passed an ordinance to condemn property for widening street, and thereafter repealed it and passed new ordinance to comply with later statutory amendments, condemnation proceeding would be regarded as an entirety.—*De Priest v. Camp, Kan.*, 168 Pac. 872.

35. **Fixtures—Installation of Machinery.**—In case where insolvent company installed machinery on premises purchased under contract later forfeited, they thereafter occupying as tenant, held that machinery did not pass to vendor on forfeiture.—*Fehleisen v. Quinn, Iowa*, 165 N. W. 213.

36.—Removability.—Water mains, laid by city through lands under lease silent as to right of removal and laid for city's use in operating its waterworks, were in nature of trade fixtures, removable at any time without consent of landowners.—*City of Gainesville v. Dunlap, Ga.*, 94 S. E. 247.

37. **Fraudulent Conveyances—Conveyance to Relative.**—Where a widowed property owner, in ill health and indebted, conveyed her entire estate to her daughter in consideration of future care and support, and the consideration was actually furnished in good faith, the conveyance was valid.—*Merithew v. Ellis, Me.*, 102 Atl. 301.

38. **Gifts—Completion.**—An instrument, directing part payment of a judgment to a designated party, being a bill of exchange under Negotiable Instruments Law (Code 1904, § 2841a, cl. 126, 127), the delivery thereof did not complete a gift of judgment fund.—*Gardner v. Moore's Adm'r, Va.*, 94 S. E. 162.

39. **Homestead—Claim of Homestead Rights.**—Where plaintiff ceased to occupy her homestead for 16 consecutive months, and failed to file with register of deeds a notice claiming homestead rights in described premises, as required by Gen. St. 1913, § 6963, she would be deemed to have abandoned the homestead.—*Hall v. Holland, Minn.*, 165 N. W. 235.

40. **Husband and Wife—Adverse Possession.**—Where the husband acquired title by inheritance from his mother, and deeded the land to his wife, who made no adverse claim to it, and the possession did not change in fact, his continued possession after the wife's death will be deemed to be under the record title, and not under the wife's alleged adverse possession.—*Evans v. Russ, Ark.*, 198 S. W. 518.

41.—Alienation of Affections.—Because a father influencing his son in relation to his wife is exonerated, if the advice is in good faith, though foolish, a greater degree of proof is required to sustain an action for alienation of the husband's affections by his father than were the alienation by another.—*Moir v. Moir, Iowa*, 165 N. W. 221.

42. **Insurance—Bad Faith.**—Where insured made no written application or voluntary representations as to ownership other than that there was vendor's lien on property, held, he could not be said to have acted in bad faith, within provision of policy that it should be void in such cases, if interest of insured was other than unconditional or sole.—*Germania Fire Ins. Co. v. Nickell, Ky.*, 198 S. W. 534.

43.—Benefit Society.—Local council of mutual benefit society authorized to waive warranties of insurance contracts, which receives member's assessments knowing his habits as to use of intoxicants, waives warranties as to such use.—*National Council and Ladies of Security v. Towler, Okla.*, 168 Pac. 914.

44.—Breach of Warranty.—That insured had changed his name to the name in which the policy was issued was not a defense to beneficiary's action on the policy, as it did not constitute a breach of warranty, as provided for in the policy.—*Modern Brotherhood of America v. White, Okla.*, 168 Pac. 794.

45.—Fraternal Society.—Where members of local lodge of fraternal beneficiary association voluntarily formed club to protect themselves against suspension for nonpayment of dues, etc. reliance on its action would not excuse member's default in assessments.—*Anderson v. Knights and Ladies of Security, Kan.*, 168 Pac. 842.

46.—Indemnity.—Policy agreeing without exception to indemnify insured against loss from use of his automobile does not furnish security for loss while the car was operated by a minor under 18 with consent of insured in violation of a state law.—*Messersmith v. American Fidelity Co., N. Y.*, 167 N. Y. S. 579.

47.—Interpleader.—Where premium on life policy was paid by third person, and, under policy, benefit was payable to him, and administrator and others garnished insurance company, which petitioned for interpleader and enjoined the garnishments, and all garnishments, except that by administrator, were dismissed, dissolution of injunction, except as to him, was proper.—*Chance v. Metropolitan Life Ins. Co., Ga.*, 94 S. E. 239.

48.—Reinsurance.—Life insurance company, agreeing to reinsure, had no legal right to increase holder's annual premium, and holder had right to stand on his original contract.—*Federal Life Ins. Co. v. Maxim, Ind.*, 117 N. E. 801.

49. **Intoxicating Liquors—Indictment and Information.**—An indictment charging that defendant within a year prior to finding the indictment unlawfully had in his possession two quarts of whiskey is bad; such act not having been an offense till three months before the finding of the indictment.—*Blair v. Commonwealth, Va.*, 94 S. E. 185.

50.—Statutory Construction.—Though Rev. Laws, c. 100, § 1, makes it crime for person to sell, expose, or keep for sale intoxicants, unless duly licensed, and complaint charged defendant exposed and kept intoxicants for sale, proof of keeping with intent to sell sustained conviction.—*Commonwealth v. Ahern, Mass.*, 117 N. E. 827.

51. **Landlord and Tenant—Respondeat Superior.**—Where accident to employee of tenant of part of building did not happen on premises demised, covenant of lease that landlord should not be liable for injury to any person on premises did not prevent tenant's employee from recovering against landlord.—*Maran v. Peabody, Mass.*, 117 N. E. 847.

52.—Trade Fixtures.—Lease of land and sawmill plant together with cars, engines, machinery, and apparatus of every kind and character then or thereafter placed on real estate held to entitle lessee to all personal property on premises necessary to operation of plant, but not to supplies in store, horses, food, medicines, etc.—*Virginia Lumber & Extract Co. v. O. D. McHenry Lumber Co., Va.*, 94 S. E. 173.

53. **Larceny—Balee.**—Where a servant directed to transport sacks of grain purchased by his employer unloaded all save two of the sacks

when he reached the employer's barn and those he carried away with intent to deprive the owner, the servant is guilty of larceny and not embezzlement.—*Hatcher v. State*, Fla., 76 So. 694.

54. Libel and Slander—Misconduct in Office.—Newspaper article, charging that plaintiff as county attorney stated to court that applicant for parole was first offender contrary to the fact, and should be granted a parole, at solicitation of applicant's attorneys and in subserviency to them, charged misconduct in office, and was libelous.—*Carver v. Greason*, Kan., 168 Pac. 869.

55. License—Constitutional Law.—Imposition of occupation taxes on blacksmiths by municipality does not violate constitutional provision requiring uniformity, because other businesses, such as hotels, were not taxed.—*O'Neal v. Town of Siloam*, Ga., 94 S. E. 238.

56. Notice—An employee of a company operating auto stages was charged with notice that the vehicles were not licensed as auto stages where the vehicles carried "for hire" signs.—*State v. Ferry Line Auto Bus Co.*, Wash., 168 Pac. 893.

57. Literary Property—Addressee of Letter.—The writer and addressee of letters together had the whole right of property, and right of possession as against one obtaining possession thereof surreptitiously and clandestinely.—*King v. King*, Wyo., 168 Pac. 730.

58. Logs and Logging—Common Law Lien.—Common law lien of owner of sawmill for contract price of manufacturing timber into lumber was not lost or waived by permitting owner's agent to take lumber from dock where it was placed as sawed and putting it upon stick in yard, even as against purchaser from such owner.—*Keystone Mfg. Co. v. Close*, W. Va., 94 S. E. 132.

59. Mandamus—Removal of Obstruction.—Mandamus lies to compel a municipal council to remove such obstructions from the streets and alleys of the city as constitute public nuisances.—*Harman v. City of Parsons*, W. Va., 94 S. E. 135.

60. Master and Servant—Accidental Injury.—Where lifting of a can of paint cause a blood vessel in a servant's lungs to burst, there was an "accidental injury" within the meaning of the Workmen's Compensation Act.—*Southwestern Surety Ins. Co. v. Owens*, Tex., 198 S. W. 662.

61. Burden of Proof—Where servant is employed to work on scaffold, and without his fault it collapses and causes personal injury, burden is on master to show that scaffold was carefully constructed and reasonably safe.—*White v. Maison Blanche Co.*, La., 76 So. 708.

62. Burden of Proof—A master who has elected to reject the Workmen's Compensation Law is presumed negligent, and where it is shown that injury could have been caused by negligent act of employer, burden is on him to show that it did not.—*Mitchell v. Des Moines Coal Co.*, Iowa, 165 N. W. 13.

63. Independent Contractor—One employed to cut wood by the cord, where there was no agreement as to hours or method of work, was an independent contractor, and the son was not an employee within the Workmen's Compensation Act.—*Fidelity & Deposit Co. of Maryland v. Brush*, Cal., 168 Pac. 890.

64. Jury Question—On conflicting evidence, question whether boy who threw bundle of newspapers from truck delivering to dealers, hitting plaintiff's intestate, stood in the relation of employee to defendant newspaper publisher, or to the truck owner, held a question for the jury.—*Alexander v. Star-Chronicle Pub. Co.*, Mo., 198 S. W. 467.

65. Public Officer—Chief of city fire department and driver of his automobile, being in discharge of their respective duties when car struck plaintiff, were public officers, and, not being servants of municipality, were not fellow servants.—*Skerry v. Rich*, Mass., 117 N. E. 824.

66. Respondent Superior—A railroad owes to a carpenter, who fell off of a bridge because the head of a spike which he was attempting to pull broke off, no duty not to use secondhand spikes.—*Texas & P. Ry. Co. v. Jones*, Tex., 198 S. W. 598.

67. Voluntary Service—That son of owner of automobile, of his own initiative, accepted invitation from borrower and operated it part of the time, including time when injury was negligently caused, did not render owner liable for injury.—*Halverson v. Blosser*, Kan., 168 Pac. 863.

68. Workmen's Compensation Act—Workmen's Compensation Law, § 17, as amended by Laws 1916, c. 622, § 5, as to compensation to alien non-resident defendants, does not grant compensation, but limits grants otherwise made.—*State Industrial Commission v. McCormick*, N. Y., 167 N. Y. S. 564.

69. Workmen's Compensation Act—Common public dirt road held not "structure" within Workmen's Compensation Act 1913, § 3, par. B.—*McLaughlin v. Industrial Board of Illinois*, Ill., 117 N. E. 819.

70. Workmen's Compensation Act—Employee killed while engaged in work of dynamiting stumps on township road held under evidence not an "employee" within Workmen's Compensation Act 1913, § 5, such employment being casual.—*McLaughlin v. Industrial Board of Illinois*, Ill., 117 N. E. 819.

71. Workmen's Compensation Act—Workmen's Compensation Act being limited to injuries occurring on, in, or about factory or other designated establishment, does not authorize recovery against owner of a packing house on account of injuries received by a truck driver while making deliveries to customers.—*Hicks v. Swift & Co.*, Kan., 168 Pac. 905.

72. Mines and Minerals—Quiet Enjoyment.—In suit for breach of covenant for quiet enjoyment by lessee of oil lands, where complaint set up paramount title, and lack of title or right of possession on lessor's part, allegation of demand on lessor for possession was unnecessary.—*Allan v. Guaranty Oil Co.*, Cal., 168 Pac. 884.

73. Mortgages—Advertisement of Sale.—Where mortgage required advertisement in designated newspaper once for four weeks before foreclosure sale, publication of an advertisement in designated paper once a week for four weeks immediately preceding day of sale is sufficient, though 28 days did not elapse between first publication and sale.—*Carter v. Copeland*, Ga., 94 S. E. 225.

74. Priority—Whether affidavit, sworn to but not acknowledged, that mortgage was intended to have been a first lien and to have been recorded before instead of after another, was recordable under Gen. St. 1915, § 2068, it could not as to stranger change priority of liens already fixed by record.—*Detmer v. Salinger*, Kan., 168 Pac. 844.

75. Redemption—Though the second mortgagee had taken possession of the premises, the first mortgagee had title and could assume possession, so that when he leased the premises to the wife of the mortgagor without objection from the mortgagor, he took possession and was entitled to the rents and profits, subject to account therefor in case of redemption.—*American Agr. Chemical Co. v. Walton*, Me., 102 Atl. 297.

76. Municipal Corporations—Assessment.—Where for street work city assesses abutting owners alone instead of including adjacent owners as required by law, remediable as to complaining abutting owner, he cannot urge that the assessment is void because other owners did not have proper notice, especially where only objection made on hearing before city council was as to amount of his assessment.—*Burroughs v. City of Keokuk*, Iowa, 165 N. W. 83.

77. Authority of Officer—A building committee of commissioners of a city as trustee, whose powers are "to examine into the report upon the expediency of erecting buildings, exhibit plans," etc., did not have power to bind the commissioners for services of an architect,

where another by-law created the office of architect.—*Barnett v. City of St. Louis*, Mo., 198 S. W. 452.

78.—**Bonded Indebtedness.**—Waterworks bonds issued under Laws 1908, c. 33, constitute a bonded indebtedness of city within Gen. St. 1916, § 1422, prohibiting cities of first class from issuing bonds in excess of 5 per cent of assessed valuation of taxable property.—*State v. Kansas City*, Kan., 168 Pac. 907.

79.—**Contract.**—Under a contract to buy sewer bonds if "legal to the satisfaction of our counsel," the bonds may be rejected and earnest money recovered. If the attorney gives his opinion that they are not legal, in the absence of fraud or bad faith, whether they are in fact legal or not.—*United States Trust Co. v. Incorporated Town of Guthrie Center*, Iowa, 165 N. W. 188.

80.—**Negligence.**—Digging of drainage trench in snow and ice along curb in public street in spring of year, to give escape for melted snow and leaving same unguarded, does not amount to negligence on part of municipality.—*Dorgan v. City of St. Paul*, Minn., 165 N. W. 181.

81.—**Nuisance.**—Maintenance of retaining wall and ornamental posts between a lawn strip and a sidewalk to prevent earth from sliding down upon sidewalk does not so obstruct public travel on street as to constitute a public nuisance.—*Harman v. City of Parsons*, W. Va., 94 S. E. 135.

82.—**Public Use.**—Where water pipes were acquired and held for special nongovernmental purpose, the city, when it had no further use for them, could lawfully convert them to another use or dispose of them.—*City of Gainesville v. Dunlap*, Ga., 94 S. E. 247.

83. **Names—Change of.**—One may lawfully change his name without resort to legal proceedings, and for all purposes the name so assumed will constitute his legal name as if he had borne it from birth.—*Modern Brotherhood of America v. White*, Okla., 168 Pac. 794.

84. **Negligence—Implied Invitation.**—If there was implied invitation to truckman from defendant to enter defendant's cellar to deliver barrel of merchandise, there was no invitation afterwards to go about in darkened cellar to find clerk or short cut to store above.—*Scanlon v. United Cigar Stores Co.*, Mass., 117 N. E. 840.

85. **Pleading and Practice—Power of Attorney.**—Rule that power of attorney should be construed strictly to exclude authority, applies to unambiguous instrument, but not to one capable of two meanings, on one of which agent acts; especially where rights of third person would be affected, and principal is bonding company.—*German-American Mercantile Bank v. Illinois Surety Co.*, Wash., 168 Pac. 772.

86. **Principal and Agent—Master and Servant.**—Porter of Pullman Company, who placed passenger's baggage in upper berth of section for safekeeping during night, was authorized to bind company by statements to passenger in morning as to what he had done with a part of the baggage which was lost.—*Palmer v. Pullman Co.*, N. Y., 167 N. Y. S. 610.

87. **Sales—Consummation.**—Where a merchant in St. Louis, Mo., telephoned his order to a warehouse at East St. Louis, Ill., for goods to be delivered in wagons of the seller, at a price including cost of goods and delivery, the sale was not consummated and the title did not pass until delivery.—*State v. Swift & Co.*, Mo., 198 S. W. 457.

88.—**Manufactured Goods.**—Contract of owner to "sell" lumber, requiring him to manufacture lumber and load it "as sales can be made," under which other party is to advance manufacturing cost, market the lumber, and account for proceeds, less a commission, created an agency to sell, and not relation of vendor or purchaser.—*Salisbury v. Brooks*, W. Va., 94 S. E. 117.

89.—**Waiver.**—Though plaintiff, in ordering machinery, waived notice of an acceptance of

his order, defendant did not have an unlimited time in which to accept it by performance, but was bound to accept within a reasonable time.—*Williams v. Emerson-Brantingham Implement Co.*, Mo., 198 S. W. 425.

90. **Sunday—Unlawful Sales.**—Sale of soft drinks as Coca-Cola held not part of restaurant business, and in violation of an ordinance substantially in the terms of Acts 1916, c. 436, re-enacting Code 1904, § 3799, and prohibiting labor on Sunday.—*Ellis v. Town of Covington*, Va., 94 S. E. 154.

91. **Trespass—Honest Mistake.**—Where the supervisors ordered a survey for locating telephone poles, and the engineer made it, locating the poles, as he thought, in the highway, and they were placed as he directed, the company was not a trespasser, if, in obeying his orders, and through his honest mistake, the poles were placed on plaintiffs' land.—*Brammer v. Iowa Telephone Co.*, Iowa, 165 N. W. 117.

92. **Trust—Party in Interest.**—Trustee, with whom lease was made, with whom negotiations were had by lessor and to whom assignments of rights of beneficiaries were made, was real party in interest authorized to sue for lessor's breach of covenant for quiet enjoyment, under Code Civ. Proc. § 869.—*Allan v. Guaranty Oil Co.*, Cal., 168 Pac. 884.

93. **Vendor and Purchaser—Exchange.**—Where a vendor agreed to exchange at the price he paid for land, and a written contract was had at \$125 per acre, when in fact vendor had only paid \$80, and prior to consummation of transaction the purchaser learned the truth, but exchanged deeds, nevertheless, reciting the written agreement, he ratified it.—*Scott v. Simons*, Iowa, 165 N. W. 161.

94.—**Parol Agreement.**—Where widow and children agreed to parol division of land, and widow, after 38 years' possession, applied for year's support, purchaser of land set apart to her by regular judgment in bona fide possession without notice of partition had legal title superior to that of children or their heirs.—*Riddle v. Shoupe*, Ga., 94 S. E. 236.

95. **Waters and Water Courses—Ambiguity in Decree.**—In determining whether each of ditches taking supply from a creek through dry channel and diverted therefrom at different places where remainder of each ditch leaves common channel are each distinct entities with priorities accordingly, where there is any ambiguity in decree Supreme Court can consider the statements of claim, surrounding circumstances, etc.—*North Boulder Farmers' Ditch Co. v. Leggett Ditch & Reservoir Co.*, Colo., 168 Pac. 742.

96.—**Surface Water.**—Surface waters, flowing into natural basin from which they normally disappeared through evaporation or percolation, held not to lose their character as surface waters by being ponded in such basin.—*Thompson v. Andrews*, S. D., 165 N. W. 9.

97. **Wills—Contract for Devise.**—Promisee in contract to devise property may act upon promisor's repudiation and sue at once to protect his rights, or may delay suit until promisor's death vests in him rights secured by contract.—*Wold v. Wold*, Minn., 165 N. W. 229.

98.—**Issue.**—"Issue," used in will, ordinarily means all lineal descendants, and unless circumstances manifest testamentary purpose to attribute to word signification other than common one, it will be construed as including lineal descendants.—*Welch v. Colt*, Mass., 117 N. E. 834.

99.—**Pleading and Practice.**—Where a party petitioned for leave to appeal from a decree of probate, and motion to dismiss the appeal was made, the allegations of the petitions for the appeal must be taken as true, and a mere denial of the truth of its allegation is not a reason for dismissing it.—*In re Ellis*, Me., 102 Atl. 291.

100.—**Presumption of Insanity.**—Successive adjudications by foreign state that testator was insane and later became sane created rebuttable presumptions of insanity between two adjudications, and of sanity after second adjudication.—*In re Baker's Estate*, Cal., 168 Pac. 881.

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SALE TO TRUSTEE OF AN EXPRESS TRUST AS CREATING PERSONAL LIABILITY.

Perry on Trustees, 6th Ed., § 475, announces the principle that in a court of law a trustee is the absolute owner of the estate and is to be treated in this way, "but in equity the *cestui que* trust is the owner, and the question in equity is how far the trustee can act without exceeding his powers, and rendering himself responsible to the *cestui que* trust." This question was quite fully considered in Taylor v. Davis, 110 U. S. 330, where it was held that an action at law could be maintained against a trustee in his individual capacity, where credit was extended for the benefit of the trust estate in his hands.

How ill this principle has been apprehended appears from a majority opinion of four to three by Oregon Supreme Court. Rothchild Bros. v. Kennedy, 169 Pac. 102, at least thus we construe the prevailing opinion.

The facts in this case show that defendant Kennedy became trustee for the creditors of the proprietor of a saloon. The trust instrument authorized the trustee to conduct the saloon business and out of proceeds of sales to pay operating expenses and pay indebtedness already incurred out of what might remain. The trustee also was authorized "to purchase such new stock as may be necessary to keep said business a going concern." The trustee purchased from a traveling salesman liquors to replace those used up, to the amount of \$937.77 and, paying \$616.54 thereon, claimed there was no liability for the balance, because of an express understanding with the salesman that there was to be no liability beyond a *pro rata* basis the business was able to

pay to creditors. There was conflict of evidence regarding this point, but the court held this was resolved in defendant's favor. Therefore the judgment for defendant was affirmed.

The following excerpt from the opinion appears to us to ignore the principle of personal liability of the trustee. Thus it is said:

"It is not necessary to determine whether Cohn could bind his principal (the creditor) by agreeing to sell for prices less than those fixed by the principal; nor is it necessary to decide whether a traveling salesman can obligate his employer to allow discounts or rebates to customers. The defense is not that Kennedy as an individual is only liable to the extent of the amount of the trust assets prorated among the creditors, but that he is not liable at all as an individual. * * * To decide that Cohn had authority to solicit an order from Kennedy as trustee does not decide that Cohn could bind his principal to agree to prorate; and, on the other hand, to decide that Cohn could not bind his principal to prorate does not decide that Cohn could not accept an order from Kennedy as trustee. But to decide that Cohn could solicit and receive orders of goods from Kennedy as trustee upon an agreement exempting Kennedy as an individual is to decide that Kennedy as an individual is not liable, and such decision ends the instant action."

This reasoning presumes that were there a fully authorized agreement, that the trustee could not be held beyond the sum for which he might be reimbursed from the trust estate, this would take away the individual responsibility the law fixes upon him as the legal owner of the property. In our judgment it would do no such thing. He would be personally liable as before, but the measure of his liability would be his reimbursement from the trust estate. By agreement a collateral fact becomes evidence to show the extent of personal liability.

But what is the result of this? It amounts to an agreement by the salesman to allow a possible discount or rebate to a customer. That this cannot be done we

think need not be debated. The customer buying, as we think he did, in his private capacity, does not seem to contend that this could be done. The dissent appears to be better founded in law than the prevailing opinion.

But there is another feature, which appears to require solution in plaintiff's favor. The trust instrument provides first for the trustee to pay the expense of operating the saloon and then "to pay the indebtedness already incurred," the surplus to be accounted for to grantor. Then there is provision for the trustee "to purchase such new stock as may be necessary to keep said business as a going concern."

This provision plainly makes new purchases an "expense of operating the saloon." They are on the same footing as salaries, rents and overhead expense, and, in the same way represent individual liability by the legal owner of the estate. They, therefore, prevent differentiating the defendant as an individual and as a trustee, not to speak of making the agreement of no real force.

NOTES OF IMPORTANT DECISIONS.

BANKS AND BANKING—ACQUIESCENCE BY DEPOSITOR IN BANK PAYING STOLEN CHECK.—In *Cherbonnier v. Citizens Nat. Bank*, 199 S. W. 307, the Texas Court of Civil Appeals holds, that where a check after being drawn and before delivery to the payee was stolen, the signature of the payee forged and collected by the thief from a bank that forwarded it to drawee bank, the assignment of the claim for reimbursement from the drawee bank, gave to the consignee no right of action, because there was acquiescence by the drawer.

It appears that the drawer authorized its agent to make purchases of grain from farmers and issue checks in its name in payment thereof. One of those checks was stolen as stated above. When it came to drawee bank it was charged against drawer's account. The agent accounted to his principal for the amount because his principal charged it to his account.

The court said: "The pleading shows that the check was paid by drawee bank, charged to the account of (agent's principal) and that (agent) acquiesced in such charge and took up the check alleging that he is the owner and holder of it." Then the court goes on to speak of the agent having the right to resist this charge to the account of depositor and his not doing so, but instead he "voluntarily paid the demand which could not have been collected from him."

There is here a confusing of matters between what the principal did and what the agent did, but whatever was done was between other parties than the bank. The agent certainly had the right to settle a disputed matter with his principal or the principal had the right to bring straight out an action against drawee bank. This it appears to us was the sense of the transaction and in this course there was no representation to the bank. If the principal could have demanded a rectification of matters his assignee could do the same thing. The agent's assumption of the amount paid on the stolen check was not money voluntarily paid so far as the bank was concerned nor was it a voluntary payment even to the agent's principal. It was the purchase of a chose in action.

INSURANCE—"COLOR BLINDNESS" AS EQUIVALENT TO BLINDNESS.—In *Routt v. Brotherhood of Railway Trainmen*, 165, N. W. 141, decided by Supreme Court of Nebraska, the by-laws of a fraternal association provided for a member recovering full amount of his beneficiary certificate, where he "shall suffer the complete and permanent loss of the sight of both eyes." In the clause it is also provided for full recovery for amputation of a hand at or above the wrist or foot above the ankle joint. The evidence establishes the fact that plaintiff became "color blind" and permanently disabled as a railroad trainman, and so was discharged by his employer. He sued on the theory that he had suffered a complete and permanent loss of both his eyes. He obtained judgment and this was affirmed in the Supreme Court.

The court held that the policy intended to afford insurance for the member in his avocation. "It does not say that he shall become blind in both eyes so as to become unable to see objects of any kind, but that he shall lose 'the sight of both eyes.' This he did when he became color blind. He lost his sight in both eyes. It affected both eyes alike. Besides the color blindness was complete and per-

manent. The thing for which he sought indemnity, loss of his vision, came to him."

This reasoning seems dialectical rather than broadly logical. Perhaps it may be called strictly Socratic. He lost his former vision by acquiring or suffering a changed vision. The same might be said if his new vision were better than the old. Therefore, it would seem that the true inquiry should have been as to impaired rather than lost vision. If it was impaired vision, it was not lost vision. Therefore, further, the issue before the Court was how serious was the impairment.

There was dissent by two members of the Court, as the contract was not to indemnify for disability in a particular vocation. If under this policy a beneficiary could recover for any slighter injury than the things for which full recovery is provided, the contention by the minority is well grounded and yet this less injury might unfit the member as to his avocation.

BANKS AND BANKING—TROVER BY PAYEE OF CHECK PAID BY BANK ON INSUFFICIENT ENDORSEMENT.—In Louisville & N. R. Co. v. Citizens' & People's Nat. Bank, 77 So. 104, there was suit in trover against drawee bank for conversion of a check by the agent of the payee, which agent, instead of depositing the check to the account of his principal, as payee, collected the cash by indorsing the payee's initials and signing his name thereunder. There was demurrer in the trial court, which, being sustained, the Supreme Court of Florida reverses.

The Supreme Court said: "In the case at bar it cannot be assumed that (the agent) had authority to take the check to the bank for deposit to the credit of the plaintiff. Certainly he had no authority to indorse the check for the plaintiff and receive the proceeds, for that is admitted in the demurrer. Therefore, the bank and no one else assumed the responsibility of dealing with Weekly as the plaintiff's agent. The drawers of the check were not at fault, because they made it payable to the plaintiff's order; the plaintiff was not at fault, for it had given Weekly no such commission as he undertook. His authority as the plaintiff's agent ceased, when, as freight agent, he received the check from the makers, as we construe the declaration. Under the circumstances of this case, as shown by the declaration, the liability of (the drawers) upon the account which they owed to the plaintiff, and to pay which they sent the check, would seem to be discharged. There would seem to be

no sufficient reason for holding (drawers) responsible for the dishonesty of the plaintiff's agent, whom it had designated to receive the check. As between the plaintiff and the makers of the check, the loss, if any, should fall upon the party more directly responsible for, and having control of, the agent whose dishonesty occasioned it."

The court further says: "There was no question as to the identity of the payee, nor was payment made on a forged instrument. The bank simply assumed the sole responsibility of treating Weekly as the agent of the plaintiff, with authority to indorse its name upon checks and collect the proceeds. It was guilty of negligence for which no one other than itself was responsible."

This case was remanded, but it is conceivable that upon trial it may be shown that this agent had collected in cash such checks and such collection ratified, thus establishing a course of business working an estoppel. But on the other hand, it might appear that plaintiff had no knowledge of such collections, as this agent made, having the duty to collect payment in cash. At all events, it may be thought, that authority of an agent, such as this agent was, having authority to collect cash, would not be departing substantially from the power vested in him, to convert paper received by him, such as a check, into cash and account for it. The makers gave what was the equivalent of cash and it was so accepted. What real harm does the agent do in converting the check into cash? And what harm does the bank do in aiding to this result? The harm was done, not in collecting cash, a thing the agent had the right to do, but afterwards in not accounting for the cash.

CONSTITUTIONAL LAW—ARREST IN OTHER STATE THAN WHERE ALLEGED OFFENSE HAS BEEN COMMITTED.—In Burton v. N. Y. C. & H. R. R., 38 Sup. Ct. 108, it was held that plaintiff had no cause of action against a railroad in which plaintiff was being transported as passenger, in not preventing her arrest and detention by police officers on telegraphic orders. The claim was that the carrier had a duty to protect plaintiff as a passenger from wrongful arrest.

In this case plaintiff was suspected of a serious offense committed in another state but was soon released.

Justice Brandeis said: "The contention is that she could not be legally arrested in New York for a crime committed in another state

except upon compliance with" the statute applying to fugitives in extradition proceedings. But the justice thought this had nothing to do with the matter and "whether the asylum state shall make an arrest in advance of requisition, and if so whether it may be made without a warrant, are matters which each state decides for itself. Such has been the uniform practice, sanctioned by a long line of decisions and regulated by legislation in many of the states." There being therefore no federal right involved, there was no right to invoke any review of New York courts in their holding in this case, that the carrier was not liable. The state courts had held the carrier was not justified in resisting peace officers of the state in making the arrest in question.

BACON'S PROPHECY—THE CHAOS OF CASES.

Lord Bacon said that within three hundred years the world would come to judge between himself and Lord Coke. The three hundred years have passed and the world is reaping the fruit of its decision to follow Lord Coke. These two men held opposing views concerning the origin and nature of law—views so radically and fundamentally different that if the one set be true, the other must necessarily be untrue. Following these two leaders two opposing schools of thought have sprung up, each represented by its leading jurists, authors, and teachers. The school of thought represented by the followers of Lord Coke has, up to the present time, greatly preponderated, in point of numbers. In fact, it may be said that, since the time of Lord Coke the legal world, as a whole, has followed in his footsteps, and, likewise as a whole, has repudiated the fundamental concepts of law held by Lord Bacon.

Up to the present time, however, the fundamental antagonism between the two schools of thought has been only dimly perceived by the great majority even of those who have ranged themselves on the one side or the other, while, so far as the profession

at large is concerned, it may be doubted whether it has known that the antagonism exists.

The two ideas, like those of democracy and autocracy in the present world struggle, have until recently been accepted as consistent traveling companions, except for sporadic outbreaks of disagreement. Now, however, the real nature of the two ideas, as shown by their results, is for the first times becoming evident.

Bacon's conception of law was that it consists of ideas which are not created by any human law-maker, but which exist as mental facts, independently of their recognition or non-recognition by humanity. He perceived that as man apprehended or discovered these already existing ideas and incorporated them into his statutes or cases, the resultant system of law would be founded upon the rock of justice, so that when the winds and floods came and beat upon the house, it would stand; whereas, so-called human laws, not founded upon principles of justice, were like a house built upon the sand, which, when the winds and rains should come, would fall, and great would be the wreck thereof.

Coke, upon the other hand, conceived of law as a thing created by statute or decision. He looked upon its as entirely local, as a matter of the fiat of the particular legislature or judge considering the question at issue. He maintained that English law and custom were indigenous to English soil, and were not indebted to foreign sources.

These, in the main, were the differences between the two men. From these differences important results arose.

Bacon believed that the fundamental ideas of the law could be gathered and stated in the shape of maxims or principles, in small compass, perhaps with illustrative cases, explaining the field of operation of each.

Coke, on the other hand, believed in the case system. He issued his Reports, and the world has since then followed his lead,

producing such a mass of reports, undigested and undigestible, that it has become well-nigh impossible to accommodate them on our shelves.

Likewise we have drifted away from Bacon's idea of establishing a few principles and basing decisions on them. Our authors for the most part refuse to cite maxims, our courts to listen to them, or our schools to teach them. The consequence is that the use of maxims is no longer understood, and instead their advocates are often derided.

Notwithstanding this general attitude, it can be demonstrated that the law can be taught from the maxims, as Bacon contend-ed. But before such a demonstration can be made on a large scale, the attitude of the profession must change, and this change can be brought about only when the bar understands the reasons for the present chaotic condition of the law.

As long as lawyers delude themselves with the idea that new principles of law are discovered every decade or two, just so long will we continue to be swamped by the publishing houses with ephemeral works designed to meet the appetite for quantity instead of quality. Publishers are capitalizing our credulous acceptance of their announcements that they are giving us five thousand new principles a year, and that the law is the latest statement of the latest decision.

The fact of the matter is that the fundamental principles of the law consist of a few ideas. They are not type on paper, and are not of human origin. Were this grasped, and these ideas stated sententiously, as the Romans stated them, and were our cases decided in accordance with them, the law would grow naturally and beautifully into a harmonious whole, instead of our having, as is the case in the United States to-day, fifty jurisdictions, each warring with all the others, and with itself also.

The fact of the matter is that whatever of our "American" law to-day is funda-

mental was reduced to maxim form by the Romans nearly two thousand years ago. This merely amounts to saying that the ideas which express themselves through us to-day, expressed themselves through men ages ago. Ideas are always expressing themselves through human agency, as that agency is able to apprehend and express them.

Take for instance the Baconian maxim, *Verba fortius accipiuntur contra proferentem* (Every presumption is against a pleader); and its cognate maxims, *Frustra probatur quod probatum non relevat* (It is vain to prove what is not alleged); and, *De non apparentibus et non existentibus eadem est ratio* (—freely translated, Things not alleged are presumed not to exist).

These maxims underlie questions of jurisdiction arising on the face of the record. Yet the Supreme Court of the United States, and the Supreme Courts of the states of Missouri, New York and others have both followed and rejected these maxims, without even mentioning them. A few cases will illustrate this.

In the case of Charles v. White,¹ a creditor brought a simple creditor's bill to subject to the lien of his judgment certain land fraudulently conveyed away by his debtor. The court rendered judgment subjecting the land to the payment of plaintiff's debt, and then further decreed that the title to the land be divested out of the fraudulent grantee and re vested in the fraudulent grantor, subject to the payment of his debts.

The Supreme Court properly held that the latter part of this decree, re vesting the title in the fraudulent grantor, not being within the issues raised by the pleadings, was void and subject to collateral attack. The court quotes extensively from the celebrated case of Munday v. Vail,² and cites numerous other authorities. From the case

(1) 214 Mo. 187.

(2) 34 N. J. Law 418 (cited with other cases L. R. A. 1916 E. 324).

of *Waldron v. Harvey*,³ the court quotes as follows:

"A decree, or any matter of a decree, which has no matter in the pleading to rest upon, is void, because pleadings are the foundation of judgments and decrees. There must not only be jurisdiction as to the person affected by the decree by having him before the court by process or appearance, but there must be jurisdiction of the matter acted upon *by having it also before the court in the pleadings.* *Multitudinous cases attest this elementary axiom of jurisdiction.* If either is wanting, the decree or judgment is void, not merely voidable or erroneous."

In other words, a case must be *coram judice.* Now what, it may be asked, is the "elementary axiom of jurisprudence" above relied upon? Is it not the maxim, *De non apparentibus*, that is, that things not pleaded, are presumed not to exist. The decision in the Charles case is correct, but if the court and lawyers in the case had been familiar with the maxim, and had contented themselves with citing it and a few cases illustrating its application, the report could have been condensed from over twenty pages to perhaps two or three. One important result of a revival of the use of maxims would thus be a saving of shelf room—an item of no little importance in itself. The writing of long opinions is now being condemned by the American Bar Association.

We now, on the other hand, come to the case of Cape Girardeau, etc., R. R. Co. v. St. Louis, etc., Ry. Co.⁴ This is an extraordinary case, in that it both affirms and denies the operation of the maxim that things not pleaded cannot be proved. The maxim itself is not mentioned by name, but it is none the less involved in the case. The fact that the same learned judge wrote the opinions in both the above cases, is somewhat of a commentary upon the education of the bar in the use of fundamental procedural maxims.

(3) 54 W. Va. L. c. 613.

(4) 222 Mo. 461.

The facts were that the Cape Girardeau Railroad sued the St. Louis Railroad in ejectment for a strip of land. The answer was a general denial. Plaintiff proved title in itself and that defendant was in possession. Defendant showed it held the land under license from plaintiff. Plaintiff showed notice to defendant, which it claimed to amount to a revocation of the license. Defendant proved that under the license it had made valuable expenditures, which estopped plaintiff from revoking the license. Here was an estoppel *in pais* proved without pleading it, and under a general denial. The court admitted that an estoppel *in pais* must be pleaded, but held that, where the parties have nevertheless gone into the trial and proved facts unsupported by their pleadings, it was too late to object on appeal to the absence of the pleadings.

Now we submit that, on the premise laid down in the Charles v. White case above, that pleadings are jurisdictional, and that a judgment not based on the pleadings is void, it is impossible for the parties to confer jurisdiction on the court, by way of waiver, growing out of their conduct at the trial. Jurisdiction of subject-matter is not a matter of waiver, nor is it within the power of parties to confer jurisdiction of a subject-matter on a court; "consent cannot confer jurisdiction." The state is here a third party in interest, and it has prescribed how jurisdiction may be vested, to-wit, by pleading a cause of action. An attempt by litigants to waive the demands of the state is *Res inter alios acta* and of no effect.

The case of *State ex rel. v. Muench*⁵ strongly supports the statement last made, and is entirely inconsistent with the *Cape Girardeau case*, although the judge who wrote the opinion in the Charles v. White and Cape Girardeau cases also concurred in the *Muench case*. Let us digress to the

(5) 217 Mo. 124.

Muench case for a moment, returning to the *Cape Girardeau case later.*

In the *Muench case* a bill was filed to appoint a successor to a trustee under a will. The successor was duly appointed, but instead of stopping there, the decree went on to provide that the court retained jurisdiction of the further administration of the estate by the new trustee. Attorneys for McManus, one of the heirs, O. K'd this decree. Later the court made an order allowing attorney's fees. This also was O. K'd by McManus' attorneys. Neither decree nor order was appealed from. Later the court made an elaborate order for the sale of some of the property, to pay certain charges against the estate. McManus sued out a prohibition against this sale. It was argued against McManus, in the Supreme Court, that he had approved the proceedings in the court below. But the court held that parties could not waive jurisdiction of the subject-matter; that the subject-matter, as shown by the pleadings, was the appointment of a new trustee and nothing else, and that in attempting to administer the estate, the action of the court was *coram non judice* and void.

The court said, in part, p. 137:

"But in modern jurisprudence a court remains passive until issues are framed in accordance with written law and their judgments must respond to such issues. A judgment is 'the sentence of the law upon the record.' It is the application of the law to the facts and pleadings. Any other view would be illogical and tend to confusion and chaos in the administration of justice."

The court then cites numerous authorities in support of its pronouncement.

Concerning the argument that the decree was a consent decree, the court says, p. 141:

"But if the chancellor, as we have held, reached out his arm too far and grasped a jurisdiction not within the issues, then that part of the decree outside the issues became *coram non judice* and void. In that view of the case no appeal was necessary,

and the void part of the judgment is subject to collateral attack."

The holding in the *Muench case*, like that in the *Charles v. White case*, is, in substance, an affirmation of the old maxim that what is not pleaded cannot be proved, or, expressed in Latin, *Frusta probatur quod probatum non relevat.*

What, then, becomes of the holding in the *Cape Girardeau case*, that without pleadings, parties can confer jurisdiction on the court in derogation of the above maxims?

But the *Cape Girardeau case* having first disallowed the maxims as above stated, proceeds in another branch of the case to enforce them, both conclusions operating against the plaintiff.

The decree below had given plaintiff judgment in ejectment and \$3,000.00 damages against defendant for occupancy of plaintiff's land. The Supreme Court, having, as above stated, reversed the judgment in ejectment, because of the unpleaded *estoppel in pais* against plaintiff, comes to the question whether the judgment for \$3,000.00 in plaintiff's favor can stand. The court decides this question in the negative on the ground that "there is no allegation of the relation of landlord and tenant, and hence it fails to state the essentials of a cause of action for use and occupation."

But, although the fact of the existence of the relation of landlord and tenant, or licensor and licensee was not pleaded, nevertheless the evidence showed the existence of such a relationship. So that on the court's own previous reasoning it was immaterial whether the existence of such a relation was alleged in the pleadings.

As to these very facts, the court said, in deciding against plaintiff on the ejectment issue, p. 411:

"With these telegrams in evidence and the proof that by the permission therein granted, defendant entered and constructed its tracks, we think the facts were before

the court, whether formally pleaded or not, and it is now too late to raise the question of pleading for the first time."

If such reasoning is correct, it would seem to follow that this proof having established the relationship of licensor and licensee between the two railroads, plaintiff was entitled to recover for the use of its land by defendant under that license.

Therefore it would seem to follow that if evidence in favor of the defendant, introduced without supporting pleadings, was entitled to consideration, then likewise evidence in favor of plaintiff should also have been considered, though also unsupported by pleadings.

It is submitted that the only true rule is that facts not alleged cannot be proved or considered at any stage of the proceedings.

That the condition of conflict over the application of procedural maxims obtains in other jurisdictions than Missouri, see the following sets of conflicting decisions:⁶

A long line of decisions in the United States Supreme Court, commencing with the earliest cases, lays down the rule, in varying forms, that pleadings are jurisdictional, and that evidence must be based on the pleadings.⁷

On the other hand, other decisions hold that the pleadings can be waived.⁸

A notable departure from the English cases and much precedent is discoverable in *Kirk v. Hamilton*,⁹ when compared with *Lester v. Foxcroft*.¹⁰

(6) *Slacum v. Pomery*, 6 Cranch 221, 225; *Vicksburg v. Henson*, 231 U. S. 259, 269; *Garrett v. L. & N. R. R.*, 235 U. S. 309, 313.

(7) *Dean v. Davis*, 212 U. S. 432, 447.

(8) 102 U. S. 68-79.

(9) *White & Tudor's Lead. Cases in Equity cited in Halligan v. Frey*, 49 L. R. A. 112-122, with notes.

(10) *Bartlett v. Crozier* (by Kent, reprinting *Rushton v. Aspinall*), 17 Johns 428, 8 Am. Dec. 428; *Walrath v. Ins. Co.*, (1916) 216 N. Y. 220.

(11) *Frear v. Swett*, 118 N. Y. 454; *Baily v. Hornthal*, 154 N. Y. 648, 61 Am. St. 643 (a decree may be supported by oral statement of counsel).

In New York the same conflict obtains. For the strict pleading rule, see cases cited.¹¹

The *Walrath* case is one of the best cases ever written along these lines.

On the other hand, there are many New York cases denying the necessity of pleadings.¹²

A key that leads to the conflicting views in New York is *Clark v. Dillon*,¹³ it is upheld and denied in alternation; it is widely cited.

The *Baily* case may be classed with *Gulling v. Bank*,¹⁴ which holds that pleadings can be waived (dissenting opinion). Other cases that so hold are cited in L. R. A. 1916 E. 298-326, which is the most extensive discussion of pleadings as a negligible element at the stage of Collateral Attack.

These same conditions exist in the District of Columbia and the states it follows, like Maryland, the Virginias, Illinois, Mississippi, and Michigan.

It is enough to say that a lawyer equipped with these decisions can make the law appear to the court in any shape he pleases. What a comment this is on our boasted "American" law! In the light of these facts, can it be said that we are improving or developing the law? Is it not, on the contrary, true that the law is being slowly disintegrated and undermined?

These are matters, not of procedure only, but also of "substantive law," notwithstanding we are taught that there is a distinction between the two kinds. Take, for instance, the *Cape Girardeau* case, above cited, where the plaintiff's "substantive" rights were entirely dependent upon the court's correct use of procedural rules—existent if the court understood and applied the rule; non-existent if it did not.

What shall be said of our American authors on procedure who fail to teach the state's interest in a record sufficient for

(12) 97 N. Y. 370.

(13) 29 Nev. 257-280.

(14) Sec. 2310.

the purposes of *res adjudicata*—a record which presents on its face a judgment based upon pleadings, thus showing what was decided and terminating the litigation once and for all, in compliance with the maxim, *Interest reipublicae ut sit finis litium?*

What shall be said of leading authors like Pomeroy, of New York, and Thompson, of Missouri, who fail to instruct us concerning these matters? Pomeroy's Code Remedies appeared in 1875; Thompson's Trials appeared in 1878. Neither they nor their editors cited Bartlett v. Crozier, Clark v. Dillon, or Slacum v. Pomeroy, above mentioned. Thompson says, "The jury find from the evidence, and not from the pleadings."¹⁵

Statements like the above from our leading American lawyers have led to the condition where our judges are deciding principles both ways in the same case. Is it any wonder that lawyers like Frederic R. Coudert, of New York, say, "The condition into which the law has fallen is due primarily to incompetency both at the bar and on the bench?"¹⁶

Is it any wonder that ex-Secretary Garrison says of the law:

"Little by little the very foundation stones of the structure are being disintegrated or undermined. The means by which this is being accomplished are so subtle and insidious that few are even aware of the fact, and there is not only no numerous army of defense, but the small handful who do utter warnings are unheeded. Their warnings fall upon deaf ears, they are scoffed at as reactionaries, as being wedded to the past, and incapable of appreciating modern ideas and the necessities of progress. The whole popular tendency of the times is averse to the calm, steady consideration necessary to reach proper conclusions."

It would seem to be high time that a restatement of the law be attempted, based

upon the principles or maxims of procedure upon which depend all substantive rights, and which involve an understanding of the state's position as a silent third party to all litigation.

EDWARD D'ARCY.

St. Louis, Mo.

DIVORCE—DECREE VESTING TITLE.

165 N. W. 753.

EMMONS v. EMMONS.

Supreme Court of Michigan. Dec. 28, 1917.

In suit for divorce, decree giving wife "use, benefit, and possession" of land, until further order of court, requiring husband to convey the land, and further ordering that further consideration of alimony and property be reversed for further order, did not vest wife with fee, and on her death, though no further order was ever made, the husband, and not her children, were entitled to the land.

MOORE, J. This is an action in ejectment. At the close of the testimony the judge directed a verdict in favor of the plaintiff. The case is brought here by writ of error.

The facts are not in dispute. It is conceded that prior to November 28, 1898, the plaintiff was the owner in fee of the land in controversy. On that day the wife of the plaintiff was granted a decree of divorce upon the ground of desertion. There was in the decree the following:

"And the court doth further order, adjudge, and decree that said complainant, Mary Emmons, from the date hereof have and enjoy the use, benefit, and possession of the land above described with all the appurtenances thereunto belonging until the further order of this court.

"And the court doth further order, adjudge, and decree that said defendant, Albert C. Emmons, forthwith convey by proper deed, to the said complainant, Mary Emmons, the real estate above described with all appurtenances thereunto belonging, and that, if he shall for three months from the date hereof fail and neglect to make conveyance as aforesaid, that this decree stand and be regarded as such conveyance, and a certified copy thereof may be recorded with the register of deeds of said county as evidence of such conveyance.

"It is further ordered that the further consideration of the question of alimony and the property interests involved in said cause be and the same are hereby reserved for further order and decree herein."

The plaintiff made no conveyance. The decree was recorded in the office of the regis-

(15) 1911 Am. Bar Assn. 681.

(16) 41 Am. Bar Rep. 376.

ter of deeds on the 1st day of March, A. D. 1898. Mary Emmons named as complainant in said decree died on the 6th day of September, 1915, leaving as her children and heirs at law the defendant, William Emmons, and Effie Smith, Lottie Riley, and Ettie Sherrard. Effie Smith, Lottie Riley, and Ettie Sherrard since becoming of age and previous to the commencement of this suit conveyed whatever right, title, or interest they had in the above-described lands to the defendant, William Emmons, who was in possession of said lands at the time of the commencement of this suit. It is also admitted that Mary Emmons had the actual possession of the said premises continuously from the date of the decree to the time of her death. It was not shown that the decree was ever modified.

It is conceded the defense hinges upon the provisions of the decree. The claim of counsel is stated in the brief as follows:

"We insist that the decree does not grant to her the title to said land in fee simple. True it is that this title may be a base or qualified title in fee simple, and not a fee simple absolute; but it is equally true that the estate granted by the decree is at least a base or qualified estate in fee.

"A base or qualified fee is an interest which may continue forever, but which is liable to be brought to an end by the operation of some act or event limiting its continuance or extent." 2 Blackstone, Com. 109; 4 Kent, Com. (12th Ed.) 9.

"In case the event which limits the duration of a base fee does not happen during the life of its owner, the estate will descend to his heirs subject to the specified determination." 2 Blackstone, Com. 109; 4 Kent, Com. (12th Ed.) 9, 10."

It is contended that, as the decree was never modified, upon the death of Mrs. Emmons her children would inherit the real estate which is the subject of this suit.

The diligence of able counsel has not called to our attention any authority that is controlling. The authority to make decrees in relation to alimony and the division of the property in cases of divorce is purely statutory, and is conferred by chapter 232, Compiled Laws, now chapter 217, C. L. 1915.

In Bialy v. Bialy, 167 Mich. 559, 133 N. W. 496, Ann. Cas. 1913A, 800 Justice Steere, speaking for the court, discusses quite at length the principles which should control in providing permanent alimony and the authority which gives the court of chancery its power to make decrees in relation thereto. In the course of the discussion it is said:

"Alimony, by whatever authority it is conferred, is an incident of marriage, and based

on the underlying principle that it is the duty of the husband to support his wife, not necessarily to endow her. Primarily it signifies, not a certain portion of his estate, but an allowance or allotment adjudged against him for her subsistence, according to his means and their condition in life during his separation, whether it be for life or for years. In practical application an award of permanent alimony in a gross sum may result in a division of the husband's estate; but the controlling element not to be lost sight of is his compulsory contribution for her support and maintenance under obligations of the marriage contract."

The record does not disclose the amount of property possessed by either Mr. and Mrs. Emmons at the time the decree in the divorce case was made. It must be conceded that the language of the decree is somewhat ambiguous. It is clear that the judge meant to decree to Mrs. Emmons personally the "use, benefit, and possession of the land * * * with all the appurtenances," not for a stated time, but until the further order of the court. There is nothing in the decree to indicate that he intended that anybody but Mrs. Emmons should "enjoy the use, benefit, and possession of the land." There is no suggestion that upon her death the real estate should go to her children. The decree closes with the statement:

"It is further ordered that the further consideration of the question of alimony and the property interests involved in said cause be, and the same are hereby, reserved for further order and decree herein."

—which is quite inconsistent with the idea that the title in fee to the real estate passed to her and her heirs by the decree.

Judgment is affirmed, with costs to the plaintiff.

Note—Modification of Decree in Divorce Applies Only to What Concerns the Future.—The conclusion the court arrives at in the instant case is quite incomprehensible. The opinion appears to concede, that had the husband defendant actually executed the conveyance the court directed, then the property would have vested in the wife so that her children would have inherited. But it is plainly stated that if the husband neglects to execute such conveyance within three months, then the decree shall operate in the same way as if he had executed it. It may "be regarded as such conveyance, and a certified copy thereof may be recorded * * * as evidence of such conveyance." If the decision is right in result, it must be because a decree in a divorce case does not operate to pass property absolutely, because it is subject to modification. Is this true?

In Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284, it is said: "There is a well recognized practice that an award of alimony is subject to modification at any time by the court that awarded

it or by an independent action in another court in either the same state or a foreign state, but such power to revise and alter a judgment for alimony does not apply to judgments in divorce actions making a final division and distribution of the husband's estate. Such a judgment cannot be reviewed or altered in this state after the term of court in which it was rendered."

In that state, then, a final judgment in a divorce case would stand like any other judgment—subject to amendment only during the term.

But independently of the right to modify decrees in divorce, it is greatly to be doubted whether the right applies to modify judgments for lump sums, or where no future payments are involved. In annotation, for example, to *Weber v. Weber*, 153 Wis. 132, 140 N. W. 1052, 45 L. R. A. (N. S.) 875, there is given an extensive annotation to a note entitled, "Modification of decree for alimony because of subsequent misconduct of former wife," and of the great number of cases cited all speak of monthly or other periodical payments.

In one of these cases it is said: "While it is competent for the court that grants a divorce from the bond of matrimony to commute the alimony and to assign a sum in gross or a specific portion of the husband's property to the wife for her support and maintenance, and thereby to make the decree for such allowance final in every respect, yet *** if the court in fact allows to the wife divorced from the bond of matrimony which it would allow to a wife divorced merely from bed and board, it is not apparent why it should lose control of the one when it does not lose control of the other." *Alexander v. Alexander*, 13 App. D. C. 334, 45 L. R. A. 806.

In *Emerson v. Emerson*, Md., 87 Atl. 633, a distinction in the question of modification is spoken of regarding alimony as a maintenance for the wife out of current income after divorce, and therefore subject to modification and not a division of the property.

And even in case of payments after the decree allusion is made to an allowance up to the rendition of the decree as being conclusive. *Cole v. Cole*, 142 Ill. 19, 31 N. E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56.

In *Stanfield v. Stanfield*, 22 Okla. 574, 98 Pac. 334, there was a monthly allowance made to the wife adjudged by the final decree, it was said: "After the divorce the parties go into the world as strangers to each other and generally even the adultery of the wife, except possible under special conditions not involved in this case, will not relieve the husband of the payment of alimony in accordance with the decree."

In the case the husband sought modification as to custody of children, but the court decided the case purely upon construction of the terms of the decree, refusing to modify it.

In English decision, periodical payments are affected by the clause, "*dum sola et casta*," but where there is an order for permanent maintenance, this clause was not usually inserted. *Medley v. Medley*, L. R. 7 Prob. Div. 122, 51 L. J. Prob. N. S. 74.

In *Flood v. Flood*, 5 Bush (Ky.) 169, there was an attempt by a husband to secure a reconveyance of property conveyed to trustees, but this was refused, the court saying: "No doubt the

Louisville Chancery Court properly adjudged a dissolution of the marital relations and restored to him the custody of his children, and adjudged to him all property which she had received from him by reason of the marriage or in consideration thereof; but it did not, nor could, adjudge to him the rights of property which had been secured to her use for life as a support in place of alimony." If this does not mean that what is settled as on the day of the rendition of a decree as distinguished from what may be modified in the future, I do not understand what is meant to be said.

It seems to me that the mobile character, so to speak, of a decree in divorce regarding property rights is in respect to what is applicable to future conditions as they arise. As to all it determines as to the past, it is as final and may be set up as *res judicata*, as any other judgment or decree. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 141.

Employment Fees.—Accepting employment upon contingent fee. Proper conditions indicated.—Is it, in the opinion of the Committee, consistent with the "essential dignity of the profession" for a lawyer to accept professional employment upon a contingent fee, even under the safeguards mentioned in Canon 13 of the American Bar Association?

If the Committee considers the practice to be, as a general rule, undignified or otherwise improper, does the Committee recognize as exceptions,

(a) Cases of commercial collections, tax-reductions or tax-refunds, and similar cases, in which it appears to be the universal custom to make compensation contingent upon success and measurable by the sum collected, refunded, etc.;

(b) Meritorious cases of any kind undertaken on behalf of poor persons?

Is the propriety of accepting employment on a contingent fee dependent to any extent upon the custom in that regard which prevails generally among members of the bar in the community wherein the lawyer in question practices?

ANSWER No. 141.

In the formulation of the canons of ethics of the American Bar Association, no subject

precipitated such debate as Canon 13, the one relating to contingent fees, which reads as follows:

"Contingent fees, where sanctioned by law, should be under the supervision of the Court, in order that clients may be protected from unjust charges."

Even as it was formulated after the debate, it has not been universally accepted. The Bar Association of Boston adopted instead the following:

"A lawyer should not undertake the conduct of litigation on terms which make his rights to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails; and a lawyer should never stipulate that in the event of success his fee should be a fixed percentage of what he recovers, or a fixed sum, either of which may exceed reasonable compensation for any real service rendered.

"Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits. Those who go further and bargain that, if successful, their fees shall be fixed sums or percentages, are not only apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. By making it, he in effect, purchases an interest in the litigation. Consequently, unhappy conflicts between his own and his client's interest, in respect to the settlement or conduct of the suit, are always likely to arise; his capacity to advise wisely is impaired; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial."

Experience shows that the contingent fee, as a general practice in any branch of the law, has a tendency to breed the twin evils of solicitation of employment and improper division of fees. It develops both in the lay and in the professional mind a conception of the practice of the law as a business, not as a profession, and tends to lower the essential standards of the Bar.

While we recognize that under existing standards each lawyer is largely the judge of the soundness of his conduct in such cases, we think that the time has come for the members of the American Bar in their respective states to reconsider the basis for the existing law upon the subject and to consider whether

all contingent fees should not by law be made subject to summary review by a Court on the application of the client.

As to the specific inquiry (a) put by the inquirer, the Committee can see no reason for applying any different principle.

As to the case (b), the Committee is of opinion that, while the practice of the contingent fee finds some justification in "meritorious cases * * * undertaken on behalf of poor persons," nevertheless such arrangements should also be under the complete supervision of the Court.

So long as the present practice prevails generally among members of the Bar in any community, this Committee cannot assume to say that there is any impropriety in lawyers practicing in such community accepting such cases, where they are unsolicited.

BOOK REVIEWS.

ZOLINE'S FEDERAL APPELLATE JURISDICTION AND PROCEDURE.

This kind of jurisdiction is one in which there are many slips by those invoking it. But in the great majority of cases the law on the subject easily may be found. The subject is not taught in the schools. It must be learned by careful search of statutes and decisions interpreting them.

The work above indicated by Mr. Elijah N. Zoline of New York and Chicago Bar and revision thereof by Mr. Stephen A. Day of Chicago and Cleveland Bar is especially helpful to the practitioner. Its propositions are fortified by a great abundance of authority, and there is an appendix of Federal Forms apparently very complete.

The binding is in buckram, the typography and paper excellent and the work comes from the law book house of Clark Boardman Co. Ltd., New York, 1917.

BOWERS ON THE LAW OF CONVERSION.

This work by Mr. Renzo D. Bowers, of Roswell, New Mexico, who is known to the profession as the author of "The Law of Waiver," a very excellent work, is a well conceived, well executed and very practical treatise on the Law of Conversion. This treatise relates in no way to equitable conversion but to that in which

exists an intent so as to make one liable for acts of dominion wrongfully exerted over the property of another, that is, if this dominion is over personal, as distinguished from real property.

The subject gives scope for treatment of a great variety of situations and relations, as well as the character and kind of personal property regarding which conversion may be charged. Thus see relation of principal and agent, mortgagor and mortgagee, pledgor and pledgee, bailor and bailee and where between parties no conventional relation exists.

The author speaks of waiver of conversion, evidence, burden of proof, presumption, manner of proof and admissibility thereof, measure of damages, the value of plaintiff's interest in converted property and the trial of causes in conversion.

On the whole, we repeat that the work is a most useful and timely book. It is typographically well executed, is bound in law buckram and is published by Little, Brown & Company, Boston, 1917.

HUMOR OF THE LAW.

"Germany declares that with her unrestricted submarine campaign she'll hold up meat, she'll hold up cotton, she'll hold up munitions, she'll hold up all neutral maritime commerce. But maybe, instead of that, she'll hold up her hands before she gets through."—Henry Flood.

"One summer afternoon," relates an American who has spent a bit of his time in China, "a young girl passed in the street of Chuan-chow, where a shabby scholar sat reading to a group of idlers outside the prefect's yamen. She had sold her last doughnut, and the day's earnings lay in her empty basket. Some one noticed how absorbed she was; a deft hand moved lightly, and the money disappeared from the basket.

"When the story came to an end, the girl awoke from her dream to find that the precious pile of cash was gone. She spoke of her loss to the people who stood near, and, with the callousness of a Chinese crowd, they all laughed. At that moment the prefect came out of the yamen, noticed the child's grief, and inquired the cause of her trouble. He waited patiently while the girl told her tale between sobs. Meantime a crowd had collected, and the prefect gave orders that the girl be taken

to the justice hall, that the case might be tried. When the people saw him re-enter, they trooped in after him, and even the idlers crowded into the yamen to see the fun.

"The examination came to an end without throwing any additional light on the theft, and some of the bystanders began to laugh. His excellency spoke a word to the attendants, and the great doors of the yamen closed with a clatter. 'Such a breach of etiquette must be punished,' said the prefect, speaking slowly and with emphasis. 'Each person shall pay a fine of eight cash before he leaves the court.'

"As the first man laid his cash upon the table, the prefect's eyes scanned his face. Then, to the surprise of everybody, the great man carefully counted the coins with his own fingers. The brown heaps of money increased, and presently a mean-looking fellow came up and paid his fine. His excellency counted the coins. 'This money is covered with grease,' he said. 'What right have you to bring dirty cash to me? Pay eight more for your bad manners.'

"The man put the money on the table without a word.

"'What!' cried the prefect, 'these coins are also covered with grease. It is against the law to pay dirty money into court. Turn out all the money you have. There are sure to be some clean coins among the number.'

"The attendants emptied the fellow's pockets and found 92 coins.

"'Ah! 92 cash, along with the 16 already paid in fines, makes 108—exactly the amount lost by the little girl. How do you account for that?'

"'It is just the sum I had in my pocket.'

"'Where did you get the cash?'

"'I got them from a man in the street in exchange for a large coin. He must have given me greasy money.'

"'Go at once and fetch that man. I will send a runner with you to bring him into court.'

"The man lay in a position that he had to take before the representative of the government, with his head flat upon the pavement, and said nothing.

"'You took this money from the child,' went on the prefect. 'It is covered with grease because she counted it after handling her oily doughnuts. She lost 108 cash, exactly the sum that was in your pocket when you entered the yamen. You are the thief!'"—Ohio Law Bulletin.

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
Last Resort and of ALL the Federal Courts.**

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1. **Adverse Possession**—Evidence.—That some of the neighbors thought a tract of wooded swamp land formed part of an adjoining plantation was not an act of possession.—*Sessions v. Tensas River Planting Co.*, La., 76 So. 816.

2. **Attachment**—Special Attachment.—Where person purchased land, and title was conveyed to him as trustee, under declaration of trust signed by himself and four others, who paid no money and indorsed to purchaser certificate of interest, "special" attachment of all right, title, and interest of persons in parcel as described, record title to which stood in his name as trustee, was valid.—*Cunningham v. Bright*, Mass., 117 N. E. 909.

3. **Assault and Battery**—Force Against Entry.—Where title to house was in dispute and defendant was in possession, his use of force to prevent entry by one which another claimant was attempting to put in possession, held not an assault.—*McGlothlin v. State*, Tex., 198 S. W. 784.

4. **Attorney and Client**—Disbarment.—Ky. St. § 97, preventing any person convicted of treason or felony from practicing law in any of courts of commonwealth, does not mean that only those who have been convicted of a felony or treason may be disbarred.—*Chreste v. Commonwealth*, Ky., 198 S. W. 929.

5.—**Fees**.—Attorney, who represented corporation and majority shareholder in suit by

minority shareholder, wherein majority holders were enjoined from carrying out conspiracy to waste corporate assets, held not entitled to have court fix fees, but he will be left to his remedy at law.—*Davidson v. American Blower Co.*, U. S. D. C., 245 Fed. 773.

6. **Bankruptcy**—Composition.—Where bankrupt omitted from financial statement debts for goods purchased for future trade, held that his offer of composition must be denied.—*In re Kerner*, U. S. D. C., 245 Fed. 807.

7.—Dividends.—Under Bankruptcy Act, §1, subsec. 23, and sections 57e, 57h, secured creditor, which realized upon collateral, held entitled only to dividend on balance, though it had no notice that collateral was bankrupt's property.—*In re Bash*, U. S. D. C., 245 Fed. 808.

8.—Judicial Review.—When a trustee in bankruptcy takes over property in hands of a state receiver, as far as title to property is concerned, the adjudication relates back to the date of the filing of the petition, and makes subject to review only actions of the receiver or the state court appointing him.—*Carter-Mullaly Transfer Co. v. Robertson*, Tex., 198 S. W. 791.

9.—Liens.—The lien of an execution, levied more than four months prior to bankruptcy, but under which no sale had been made, held good as against the trustee in bankruptcy.—*In re Zeis*, U. S. C. A., 245 Fed. 737.

10.—Statement of Assets.—A bankrupt's written statement of his financial condition from which liabilities are omitted cannot be defended on the ground that assets were also omitted, and that the balance was therefore substantially correct.—*In re Maaget*, U. S. D. C., 245 Fed. 804.

11. **Banks and Banking**—Unlawful Dividend.—Officers and directors of a banking corporation, who participated in the declaration of a dividend out of the capital of the corporation, which was then insolvent, are liable to the receiver to the amount of the dividends received by them.—*Wood v. Noyes*, U. S. C. A., 245 Fed. 742.

12.—Usage.—Though articles of incorporation of bank did not formally provide for voting by proxy on question of dissolution, such voting held permissible by usage and because not objected to.—*Rossing v. State Bank of Bode*, Iowa, 165 N. W. 254.

13. **Beneficial Associations**—Local Councils.—The Grand Master of a lodge in the absence of pleading or evidence to show authority upon his part, held not authorized to bind the lodge in an application for fidelity insurance for the treasurer.—*Western Indemnity Co. v. Free and Accepted Masons of Texas*, Tex., 198 S. W. 1092.

14. **Bridges**—Speed Regulation.—St. 1915, § 1323, relating to riding or driving over bridge faster than a walk, is not applicable to automobiles, and does not give a city power to regulate their speed.—*City of Baraboo v. Dwyer*, Wis., 165 N. W. 297.

15. **Brokers**—Bad Faith.—Where brokers knew customer they had procured for principal's farm could not perform agreement to convey property in return unless he could raise loan on farm to discharge incumbrances on his property, and they agreed to procure loan, and concealed

facts from principal, their bad faith precluded them from recovering commission.—*Pugh v. Christensen*, Wis., 165 N. W. 294.

16. Cancellation of Instruments—Vendor's Lien.—Transferee of purchase-money note given for land is not necessary party to vendor's suit to cancel conveyance for fraud, etc., if he has valid lien to secure note, and desires to foreclose it, judgment in suit cannot affect his rights.—*McKenzie v. Frey*, Tex., 198 S. W. 1009.

17. Carriers of Goods—Misdelivery.—Under Vernon's *Sayles' Ann. Civ. St.* 1914, art. 710, requiring carriers to deliver goods as provided by common law, etc., a carrier is liable for misdelivery made in good faith and without negligence, unless error was caused by consignor.—*Missouri Iron & Metal Co. v. Texas & P. Ry. Co.*, Tex., 198 S. W. 1067.

18.—Proximate Cause.—Where plaintiff shipped a piano to a point 163 miles distant, and 15 days later, while standing in way yards, it was damaged by the Dayton flood, the proximate cause was the act of God, and not the delay, and the carrier was not liable.—*Chicago & E. Ry. Co. v. Schaff Bros. Co.*, Ind. 117 N. E. 869.

19.—Waybill.—Since the shipper is not a party to the waybill made out for the convenience of connecting carrier he is not bound by it, and it is not admissible in evidence against him to show the destination of the goods.—*Quanah, A. & F. Ry Co. v. Warren*, Tex., 198 S. W. 814.

20. Carriers of Live Stock—Negligence.—Where a carrier gave hogs no attention or care during delay in shipment causing exposure and death, though it considered storms such as to justify delay, it was negligent.—*Gormley v. Chicago & N. W. Ry. Co.*, S. D., 165 N. W. 249.

21.—Notice of Shipment.—Provision in contract for interstate shipment of live stock, that, as a condition precedent to recovery of damages, written notice of loss or injury be given to carrier within a day after delivery at destination, is valid, and failure to give such notice bars action for damages.—*Chicago, R. I. & P. Ry Co. v. Brockmeier*, Okla., 168 Pac. 1011.

22. Carriers of Passengers—Alighting.—In action by plaintiff for injury from being struck by passing automobile while she was alighting from defendant's street car, negligence of driver of automobile would not relieve defendant, if it also was negligent.—*Woods v. North Carolina Public Service Co.*, N. C., 94 S. E. 459.

23.—Employees.—A contract of a railroad to furnish transportation to employees back to their home state after they quit working or are discharged is not binding under the Hepburn Act of June 29, 1906, prohibiting giving free transportation.—*Southern Ry. Co. v. Linear*, Tenn., 198 S. W. 887.

24.—Proximate Cause.—Failure to stop train at flag station on signal of a woman wishing to take passage is not proximate cause of her injury from falling into cattle guard, she needlessly attempting to walk to her destination on the track.—*Brown v. Linville River Ry. Co.*, N. C., 94 S. E. 431.

25.—Intending Passenger.—One intending to become railroad passenger has right to go to station within reasonable time before train's de-

parture, and has to do anything proper to facilitate loading baggage on train, and road owes him duty to exercise ordinary care for his safety.—*Baker v. Williams*, Tex., 198 S. W. 808.

26.—Proximate Cause.—Any negligence of porter of Pullman car on siding in city, in temporarily leaving it with door closed, and a woman passenger alone therein, held not proximate cause of any injury to her from fright on her unsuccessful effort to open door.—*Pullman Co. v. Gutierrez*, Tex., 198 S. W. 1065.

27.—Trespasser.—Conceding that a person on a passenger train was a trespasser, the railroad was liable if he was injured when required by its employes to get off a train moving 15 miles an hour.—*Missouri, K. & T. Ry. Co. of Texas v. Anderson*, Tex., 198 S. W. 795.

28. Chattel Mortgage—Deficiency.—In action on notes secured by chattel mortgage on threshing machine engine after sale of engine, leaving a deficiency where plaintiff pleaded a public sale under the mortgage, it could not recover on a subsequent private sale not pleaded, but concealed during the former trial.—*Aultman-Taylor Machinery Co. v. Forrest*, Colo., 168 Pac. 1119.

29.—Recission.—A deed of trust to cover advances to a tenant, where the owner immediately refuses to make the advances, cannot be used as a basis for appointment of a receiver, although it recites that it is to be also supplemental security for a balance due under a deed of trust for the preceding year, where the tenant acquiesces and offers possession, such acts being in effect a recission of the deed.—*Burton v. Pepper*, Miss., 76 So. 762.

30. Commerce—Employe.—Employe, pumping water into tank for use of engines engaged in interstate commerce, held engaged in such commerce, where such use of the water is not dependent on any remote possibility.—*Collins v. Erie R. Co.*, U. S. D. C., Fed. 811.

31.—Meat Inspection.—That fees collected for inspection of meat, both originating within and shipped into the state, are apportioned to a common fund and jointly used to pay the entire cost of inspection, does not raise presumption that the fees for interstate inspection are excessive, and that the ordinance is therefore in violation of Const. U. S. art 1, § 10, prohibiting imposts.—*Boyd v. City of Louisville*, Ky., 198 S. W. 927.

32. Constitutional Law—Interest in Question.—Injured employe, having no right of recovery except under Employers' Liability Law, was without interest to question its constitutionality.—*Woodruff v. Producers Oil Co.*, La., 76 So. 803.

33.—Religious Freedom.—Notwithstanding constitutional provision as to religious freedom, held, that it was an offense to pretend to believe in supernatural powers for the purpose of procuring money and to use the mails in pursuance of such purpose.—*New v. United States*, U. S. C. C. A., 245 Fed. 710.

34. Contracts—Illegality.—Where a contract between plaintiff and defendant for the organization of a corporation contemplated that they should each be directors, an agreement that each should vote for the other for offices was illegal.—*Lothrop v. Goudeau*, La., 76 So. 794.

35.—**Quantrum Meruit.**—Modification of rule that one suing on a contract must show performance of antecedent obligations, allowing recovery on quantum meruit in case of building or improvement contracts where substantial performance is shown, does not apply where contract provides a specific method of adjustment in case of breach.—*R. A. Poe & Co., v. Town of Brevard, N. C.*, 94 S. E. 420.

36. **Corporation—Bondholders.**—Where a corporation's property mortgaged to secure bonds was leased to another corporation under agreement that royalties should be paid to the trustee to care for the interest payments on the bonds, the lessor corporation and one of its officers could not bind the other bondholders without their consent to a second agreement that royalties should be paid to the officer on agreement to care for interest payments on certain bonds to the exclusion of others.—*Mercantile Trust Co. of San Francisco v. Sunset Road Oil Co., Cal.*, 168 Pac. 1037.

37.—**Employment of Counsel.**—President of corporation held empowered to employ counsel to defend action against corporation, unless forbidden, though not directed to do so by the directors.—*Blue Goose Mining Co. v. Northern Light Mining Co., U. S. C. C. A.*, 245 Fed. 727.

38.—**Estoppel.**—Where a corporation has borrowed money and used it to advantage for three years, it is estopped to set up that the loan was for an unlawful purpose and ultra vires, especially where there is a presumed finding that the lender did not know of the unlawful use.—*Carter-Mullaly Transfer Co. v. Robertson, Tex.*, 198 S. W. 791.

39. **Dedication—Intent.**—An intention to dedicate will be more readily presumed in regard to urban than to country property, and in regard to well-settled country than in regard to wild, wood, or waste land.—*Wiehe v. Pein, Ill.*, 117 N. E. 849.

40. **Deeds—Quitclaim.**—A girl 18 years of age who did not know what her interest was in land, who was uneducated and told a quitclaim deed was but a paper giving the grantee the power of managing the land for her, held entitled to cancellation on the ground of fraud and want of consideration.—*Crodle v. Dodge, Wash.*, 168 Pac. 986.

41. **Dower—Inadequate Consideration.**—A conveyance for a grossly inadequate consideration, and for purpose of defeating dower rights, made by a man shortly before marriage, will be avoided, so far as affecting dower.—*Robers v. Robers, Ark.*, 198 S. W. 697.

42. **Drainage—Plans and Specifications.**—Where, as required by statute, an accurate map of the entire drainage system, showing the plans of the entire district, the route and width of the canal and all its branches, the different levels of the various points, the bottom and grade of the proposed improvements, the total yards of excavation, with the estimated cost, and the plans and specifications and the costs of any other work required to be done, was present at the hearings, the landowner had ample opportunity to determine the damage to his land and the timber.—*Beaufort County Lumber Co. v. Drainage Com'r, N. C.*, 94 S. E. 457.

43. **Electricity—Res Ipsa Loquitur.**—Unexplained, the fact of feed cable of street railroad being broken loose from fastening to iron pole at street side, and at intervals coming in contact with pole, shocking a boy, raises a presumption of negligence under res ipsa loquitur doctrine.—*Bennett v. International Ry. Co., N. Y.*, 167 N. Y. S. 690.

44. **Eminent Domain—Abandonment.**—Water company, having begun proceedings to condemn land for its site, an award of damages having been made and confirmed, without appeal therefrom, could not thereafter abandon the proceedings, the property owner having acquired a vested interest in the award.—*York Shore Water Co. v. Card, Me.*, 102 Atl. 321.

45. **Execution—Reversal of Judgment.**—If officer has such execution as will protect him, and the sale he makes is fair, it is concluded when the property is delivered to the purchaser, and will be divested because the judgment may be thereafter reversed.—*Webb v. Webb's Guardian, Ky.*, 198 S. W. 736.

46. **False Imprisonment—Arrest.**—"False imprisonment" may arise without actual arrest, assault, or imprisonment, and may be committed by words alone, or by acts alone, or both.—*Riley v. Stone, N. C.*, 94 S. E. 434.

47.—**Malicious Prosecution.**—Declaration alleging bringing of suit for excessive amount resulting in plaintiff being sent to jail for inability to procure bail, held to state a case for malicious prosecution and not for false imprisonment or abuse of process.—*Roberts v. Danforth, Vt.*, 102 Atl. 335.

48. **Private Party Requesting Arrest.**—Private person requesting officer to make arrests and suggesting necessity of warrant, and who does not assist officer in making arrest for which officer deemed warrant unnecessary, is not liable for false imprisonment.—*Allen v. Lopinsky, W. Va.*, 94 S. E. 369.

49. **Fraud—Opinion.**—Statement by corporation's representative, to induce defendant to exchange his stocks for its bonds and to renew stock notes, that bonds were as good as gold and that he could resell them, was mere statement of opinion and not such misrepresentation of fact as to be actionable fraud.—*Thorpe v. Cooley, Minn.*, 165 N. W. 265.

50. **Frauds, Statute of—Debt of Another.**—Where plaintiff let one have goods on another's verbal promise that he would see that debt was paid and charged account to both, the promise was a promise to pay the debt of another, and not being in writing was void.—*McAfee v. Benson Bros. & Co., Ga.*, 94 S. E. 328.

51. **Garnishment—Pleading and Practice.**—Where defendants in assumpsit, pleaded that they had been served with trustee process, objection by plaintiff corporation that such process had not been served on it did not avoid the plea, since the question whether an order for service of the trustee process on the principal defendant, the plaintiff herein, could be granted was a matter to be determined in the trustee case, and not in the assumpsit, to which plaintiff in the trustee suit was not a party.—*Piedmont & Georges Creek Coal Co. v. Perry, Me.*, 102 Atl. 327.

52. Gifts—Presumption.—When a father is old and infirm, and the money or other property given to a son constitutes his whole estate, and the circumstances tend to rebut the presumption of a gift, question whether a gift or a loan was intended held for the jury.—*Hix v. Scott*, W. Va., 94 S. E. 399.

53. Highways—Reckless Driving.—Testimony that team just ahead of plaintiff's also became frightened by defendant's automobile was admissible as circumstance tending to show that defendant was driving recklessly.—*Conrad v. Shuford*, N. C., 94 S. E. 424.

54. Homestead—Estoppel.—Where wife joined in deed of warranty merely to relinquish dower, but on breach of warranty suffered default judgment against her, she was thereby concluded, and her homestead acquired with her money after making the deed, was not exempt.—*Miracle v. Purcifull*, Ky., 198 S. W. 753.

55. Injunction—Forfeiture.—Under contract for timber, whereby defendant was to make certain improvements as part consideration within two years or forfeit deposit, and subsequent contract that improvements be made before certain date, but not referring to forfeiture, it was erroneous to enjoin further cutting and decree cancellation of contract before two years had expired, without ordering return of deposit or accounting.—*McClurg v. Hicks*, Miss., 76 So. 736.

56. Insurance—Accident—Accident policy, insuring against scheduled injuries, including death, held to cover death by murder, notwithstanding clause that insurance shall not extend to loss due to act of another to "injure" insured.—*Interstate Business Men's Accident Ass'n v. Dunn*, Ky., 198 S. W. 727.

57. By-Laws.—A clause in by-laws of mutual association limiting liability to "death by accidental means," held not inconsistent with the policy allowing benefits for "accidental death."—*Pledger v. Business Men's Accident Ass'n of Texas*, 198 S. W. 810.

58. Intentional Killing.—Whether accident policy containing no specific exception covers intentional killing by third person depends on whether insured, being in the wrong, was the aggressor under circumstances rendering a homicide likely.—*Clay v. State Ins. Co.*, 94 S. E. 289.

59. Intoxicating Liquors—Burden of Proof.—In prosecution for manufacturing liquor in violation of Pub. Laws 1917, c 157, state need not show spirituous liquor was actually produced at still where defendant was arrested, and if persons operating it had been caught in act of making liquor they could be convicted, though process had not reached final stage.—*State v. Horner*, N. C., 94 S. E. 291.

60. Joint Adventures—Abandonment.—A co-adventurer does not forfeit his interest in joint property or assets acquired with money he has paid or advanced, by his abandonment of the enterprise, failure to contribute to its expenses, or opposition to its prosecution.—*Kaufman v. Catzen*, W. Va., 94 S. E. 388.

61. Landlord and Tenant—Harvesting Ice.—Defendants could not acquire by adverse possession right to harvest ice from disputed portion of river, while they held same as lessees and paid rent for the use.—*Whittier v. Montpelier Ice Co.*, Vt., 102 Atl. 332.

62. Estoppel.—Rule that tenant is estopped to deny landlord's title in action against him by landlord applies, where tenant was let into possession by landlord, or thereafter retained possession of land under lease.—*Rosin Coal Land Co. v. Martin*, W. Va., 94 S. E. 358.

63. Oral Agreement.—If sued for rent by grantee of store premises, lessee could not have escaped payment by proving oral agreement between grantor lessors and grantee that former should receive accruing rent until close of term.—*Taylor v. Kennedy*, Mass., 117 N. E. 901.

64. Libel and Slander—Instructing.—Instructing that in determining whether defendant uttered slander, "with an honest belief" in its truth, jury shall judge his conduct by degree

of care and caution of ordinarily prudent man under like circumstances, held proper.—*Sullivan v. McCafferty*, Me., 102 Atl. 324.

65. Privileged Communication.—Employer's accusation that employe had taken goods from store and asking her to write down a few of the things she had taken was slanderous and actionable per se, unless it was true or privileged, and, if false and not privileged, he was liable.—*Riley v. Stone*, N. C., 94 S. E. 434.

66. Mandamus—Appropriate Remedy.—Mandamus is appropriate remedy to compel county depository under depository act (Acts 1915, c. 84) to credit sheriff with interest on public funds in its hands and to pay his lawful orders upon it.—*Belcher v. First Nat. Bank*, W. Va., 94 S. E. 380.

67. Right to Issue.—Mandamus will lie to compel a district judge to render judgment in a cause which has been tried on its merits, and where he has ordered an indefinite continuance of the cause after the trial.—*Delord v. Lozes*, La., 76 So. 759.

68. Master and Servant—Casual Employment.—Where the servant was employed casually not under contract, but on various odd jobs, as plasterer in repairing building for defendant, who owned apartment houses, he was not in employ of the company in business declared hazardous by the Workmen's Compensation Law.—*Solomon v. Bonis*, N. Y., 167 N. Y. S. 876.

69. Commerce.—Where complaint showed employee was pumping water into tank for use of engineers engaged in interstate commerce, held, that it might be inferred on demurrer that such use was immediate, and not dependent on remote possibilities.—*Collins v. Erie R. Co.*, U. S. D. C., 245 Fed. 811.

70. Evidence.—A letter signed in name of defendant corporation, followed by an individual's name, complaining of collision with its truck by plaintiff's auto, held sufficient evidence of defendant's ownership of truck.—*Wood v. Indianapolis Abattoir Co. of Kentucky*, Ky., 198 S. W. 732.

71. Fellow Servants.—Company chartered as railroad corporation and operating railroad, though only for private purposes of a cement company, held within Const. § 162, and Code 1904, § 1294k, abolishing the fellow-servant doctrine.—*Wilson's Adm'x v. Virginia Portland Ry. Co.*, Va., 94 S. E. 347.

72. Hazardous Employment.—Assisting in procuring men and materials for the work, held incident to hazardous employment of foreman of road construction for town (Workmen's Compensation Law, § 2, groups 13, 43, and section 3, subds. 3, 4), entitling him to compensation for injury therein.—*Lanigan v. Town of Saugerties*, N. Y., 167 N. Y. S. 654.

73. Hours of Service Act.—Releases of train crews for short periods held not to break continuity of service, within Hours of Service Act, where the men were required to hold themselves in readiness to respond to a call for their services when needed.—*United States v. Southern Pac. Co.*, U. S. C. C. A., 245 Fed. 722.

74. Negligence.—If master allowed elevator to descend while plaintiff was underneath repairing frame, and if he had been induced to believe by previous conduct that it would not be moved, negligence is clear.—*Taylor v. Tallassee Power Co.*, N. C., 94 S. E. 432.

75. Negligence.—In action admittedly under federal Employers' Liability Act, negligence of employee using Maul, head of which flew off and struck plaintiff, held not a defense.—*Kight v. Vicksburg, S. & P. Ry. Co.*, La., 76 So. 799.

76. Workmen's Compensation Act.—Passer-by, requested by driver of relator's mired coal wagon to assist in releasing it, was the relator's servant, and entitled under Workmen's Compensation Act to compensation for injury while so assisting.—*State v. District Court of Ramsey County*, Minn., 165 N. W. 268.

77. Workmen's Compensation Act.—Under Workmen's Compensation Act, § 3, subd. 7, defining injury and personal injury, employe, receiving accidental injury arising out of and in course of his employment, held not entitled to

compensation for permanent disability by loss of sight by reason of pre-existing syphilitic condition, not itself naturally and unavoidably resulting from the injury.—*Borgsted v. Shults Bread Co.*, N. Y., 167 N. Y. S. 647.

78. **Mortgages**—Relation Back.—Deed of trust to secure notes intended to be negotiated by grantor to third persons is valid, although no money passes at its execution, as the consideration subsequently furnished by purchaser of notes will relate back and sustain the deed.—*Pence v. Jamison*, W. Va., 94 S. E. 383.

79. **Municipal Corporations**—Barriers in Street.—Cities are not generally required to erect barriers along highways to prevent travelers from falling into nearby excavations, but where an unguarded pit endangers travelers using street with ordinary care, reasonable precaution requires city to place a guard, and its failure to do so is negligence.—*City of Wabash v. Bruso*, Ind., 117 N. E. 867.

80.—Constitutional Law.—Giving of demand note by mayor and council of a town, before collection and payment of taxes, to pay for street lighting, did not violate Const. art. 7, § 7, par. 1, forbidding municipal debts, without assent of two-thirds of qualified voters at an election therefor.—*City of Hogansville v. Planters' Bank*, Ga., 94 S. E. 310.

81.—Paving Contract.—Where a paving contract provided that on breach thereof the town could do the work itself and charge the cost against the contract price, the town will not be credited for an increase in cost occasioned by using better material than the contract called for.—*R. A. Poe & Co. v. Town of Brevard*, N. C. 94 S. E. 420.

82.—Plats.—An inartistic and not exactly accurate plat, and such as, in connection with the description, would enable any one readily to ascertain the territory to be severed from the municipality was a substantial compliance with Code, § 622, requiring a plat to be attached to the petition for severance of territory.—*Estrem v. Town of Slater*, Iowa, 165 N. W. 263.

83.—Speed Regulations.—Under St. 1915, § 1636—49, prohibiting unreasonable speed of automobiles, and making the speed limit in unusual circumstances, depend upon the particular facts of the case, and section 1636—55, providing that local regulations can only be made in strict conformity with statutes an ordinance fixing a limit of 10 miles over all bridges, regardless of condition, is invalid.—*City of Baraboo v. Dwyer*, Wis., 165 N. W. 297.

84.—Statutory Construction.—A beaten path used by pedestrians and running across street is not "intersection of highways" within the meaning of statute requiring driver of automobile to give signal on approaching such an intersection.—*Aiken v. Metcalf*, Vt., 102 Atl. 330.

85.—Street Assessment.—Oiling of city streets being permanent improvements, preserving and making streets more lasting for travel, reasonable part of cost may be assessed against street railway using such streets.—*Henderson Traction Co. v. City of Henderson*, Ky., 198 S. W. 730.

86. **Names**—Idem Sonans.—Under rule of idem sonans names Doke and Dope are sufficiently alike in sound as not readily to suggest a difference to hearer.—*Rhodes v. State*, Fla., 76 So. 776.

87. **Negligence**—Anticipating Injury.—A gas company whose employees leave a hole in the floor in a closet in a dwelling cannot escape liability on the theory that it could not be anticipated that the occupant would go into the closet.—*Louisville Gas & Electric Co. v. Nall*, Ky., 198 S. W. 745.

88. **Parties**—Joinder of.—Where repair work was done on gas pipes in a dwelling by a plumbing company and by the gas company, one of which left the floor in a dangerous condition, causing injuries to the lessee, she could join both parties as defendants, alleging one act of negligence.—*Louisville Gas & Electric Co. v. Nall*, Ky., 198 S. W. 745.

89. **Principal and Surety**—Signatures.—Where after signature of promissory note ap-

peared the word "principal," and other signatures were characterized as "sureties," payee was charged with notice of relations between principal debtor and sureties.—*Durfee v. Kelly*, Mass., 117 N. E. 307.

90. **Process**—Usual Place of Abode.—Where unmarried woman owning house in Mississippi left it in occupancy of sister's family and went to California, remaining for two years, intending to remain for indefinite time, residence in California was "usual place of abode" while away within Code 1906, § 3926 (Hemingway's Code, § 2933), relative to service on absent defendant by posting.—*Hendricks v. Kellogg*, Miss., 76 So. 746.

91. **Railroads**—Licensees.—That public may have been accustomed to travel along a portion of railroad right of way and no measure have been taken to prevent it does not constitute such persons licensees of the company, and they are only trespassers.—*Pope v. Seaboard Air Line Ry.*, Ga., 94 S. E. 311.

92.—Wanton Destruction.—Railroad, whose wrecking crew, in repairing tracks willfully and wantonly destroyed plaintiff's schooners, which a violent gale had carried upon the tracks, held liable for their value.—*Louisville & N. R. Co. v. Joullain*, Miss., 76 So. 769.

93. **Receivers**—Appointment.—Only the gravest emergency will entitle one to the appointment of a receiver without notice, under Code 1906, § 625, providing that "good cause" must be shown why notice should not be given.—*Burton v. Pepper*, Miss., 76 So. 762.

94. **Set-off and Counter Claim**—Money Had and Received.—In action ex contractu a cross-action for plaintiff's conversion of defendant's property, not appearing to have been converted into money, cannot be construed as action for money had and received, but will be construed as action ex delicto, which ordinarily cannot be maintained as cross-action in action ex contractu.—*Henderson v. Hardeman & Phinizy*, Ga., 94 S. E. 317.

95. **Telegraphs and Telephones**—Ordinary Care.—Telephone company, while bound to use reasonable care to keep its poles and wires in such condition as will make highway reasonably safe, is not liable for break from unknown defect occurring after nightfall, where it was repaired immediately on discovery in morning.—*Wells v. Cumberland Telephone and Telegraph Co.*, Ky., 198 S. W. 721.

96. **Vendor and Purchaser**—Defence.—When deed is made and possession is taken thereunder, want of title will not enable purchaser to resist payment of price while he retains deed and possession, and has been subjected to no inconvenience or expense.—*Rook v. Wright*, Ind., 117 N. E. 864.

97. **Wills**—Defeasible Fee.—Will devising lands to one "to be hers during her lifetime, and then to go" to others, and "if they should die without any bodily heirs then said lands to go back to" other persons, creates fee subject to be terminated by the happening of the death or a shifting use operating by way of an executory devise.—*Kirkman v. Smith*, N. C., 94 S. E. 428.

98.—Devise.—Where will required devisees to deliver bale of cotton to widow annually, contention that by consenting to partition she waived any lien or right not specifically preserved, held without merit.—*Roberts v. Burwell*, Miss., 76 So. 738.

99.—Homestead.—Where husband dies testate seized of a homestead, and widow elects under statute, and renounces provision of will, court will first award her homestead interest not subject to debts of deceased, under Rev. St. 1913, § 3092, and then award her share as heir in remainder, under section 1905.—*In re Grobe's Estate*, Neb., 165 N. W. 252.

100.—Trust.—A will devising land "in trust for the benefit of" one named, created a trust, although it attempted to place conveyance to the beneficiary on the sole judgment of the trustee as to when the beneficiary should become a "careful and prudent man," and allowed the trustee to sell or keep the land for himself.—*Keating v. Keating*, Iowa, 165 N. W. 74.

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ELIGIBILITY IN FEDERAL COURT OF WITNESS CONVICTED OF INFAMOUS CRIME IN STATE COURT.

In Rosen v. U. S., 38 Sup. Ct., 148, the U. S. Supreme Court holds that a person who is offered as a witness in a District Court of the United States is not disqualified from testifying because of having been convicted of an infamous crime in a state court of the state in which the District Court is sitting.

In 83 Cent. L. J. 311, there was reference to a similar ruling by Sixth Circuit Court of Appeals in the case of Brown v. U. S., 233 Fed. 353, and this position was taken in Spear v. U. S., 144 U. S. 303, where a pardon was held sufficient to remove the supposed disqualification, that otherwise would have resulted. In Boyd v. U. S., 142 U. S. 450, the same ruling was made. Reference also was made to Reid v. U. S., 12 How. 2, and Logan v. U. S., 144 U. S. 263. The latter case held that disqualification by North Carolina statute would not operate in the trial of a case in a district federal court sitting in Texas. No reference, however, was made to Benson v. U. S., 146 U. S. 325. All of these cases are considered in the opinion in the Rosen case, in which there was dissent by Justices Van Devanter and McReynolds under the doctrine of *stare decisis* in the Reid case, followed in the Logan case. The Supreme Court in the Rosen case said that forty years intervened between the Reid and Benson cases and a little less than thirty years since the Benson case was decided. In the latter case it was held the Reid case was not decisive of that. It was pointed out in the Benson case, that a great change had come over the courts as to competency of witnesses and in the removal of merely technical barriers in the exclusion of witnesses, and now it is said:

"In the almost twenty years which have elapsed since the decision of the Benson case the disposition of courts and of legislative bodies to remove disabilities from witnesses has continued, as that decision shows it had been going forward before, under dominance of the conviction of our time that the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent, with the result that this principle has come to be widely, almost universally, accepted in this country and in Great Britain.

"Since the decision in the Benson case we have significant evidence of the trend of congressional opinion upon this subject in the removal of the disability of witnesses convicted of perjury (R. S. 5392) by the enactment of the Federal Criminal Code in 1909, with this provision omitted and § 5392 repealed. This is significant, because the disability to testify of persons convicted of perjury survived in some jurisdictions much longer than many of the other common-law disabilities, for the reason that the offense concerns directly the giving of testimony in a court of justice, and conviction of it was accepted as showing a greater disregard for the truth than it was thought should be implied from a conviction of other crime.

"Satisfied as we are that the legislation and the very great weight of judicial authority which have developed in support of this modern rule, especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle, we conclude that the dead hand of the common-law rule of 1789 should no longer be applied to such cases as we have here, and that the ruling of the lower courts on this first claim of error should be approved."

In our reference to the Reid case in 83 Cent. L. J. 311, we deduced the conclusion that some known and established rule was to govern, from Chief Justice Taney saying that the intention of Congress in not making any specific rule was to this effect, and we said that: "This rule may be thought to refer federal courts to the common law." In the Rosen case, our Supreme Court, therefore, seems to cut loose from

the common law rule in deference to the enlarged view of state courts creating what is called the "modern rule." This modern rule takes in witnesses having knowledge of facts, with their credibility to be determined by the jury.

While we heartily agree that progress ought to obtain in our courts in exposition of the principles of the common law, yet it seems to us, that intent, especially as regards courts, with only statutory powers, is equivalent to express direction. If "the dead hand of the common law rule of 1789" was a live hand when the Reid case was decided, the statute with regard to such tribunals, that this dead hand, however it might be forgotten in courts of natural jurisdiction, became petrified in courts of purely conferred jurisdiction.

Furthermore, it has seemed to us, that not always have courts possessing general jurisdiction, such as state courts are, been accorded the respect that the Rosen case grants them. Especially does this thought seem pertinent as to many of the lower federal courts. We trust this Rosen case will carry its lesson to our inferior federal courts, and cause them to accord increase of influence to state courts. If they can cause a change of ruling in our highest tribunal, they ought to be accorded more finality in questions involving common law ruling than has been granted.

It is as much a grant of power to confer on statutory federal courts procedure under common law rules as it is to prescribe specifically the manner in which they shall exercise their powers. If, as Chief Justice Taney ruled in the Reid case, the common law rule as to competency was meant, this was to continue until statute should supersede that rule. The fact, that it did continue down to 1895, ought to give some assurance that the legislative power has acquiesced in construction by the courts of the power vested in courts organized under congressional statute.

NOTES OF IMPORTANT DECISIONS.

ILLEGAL CONSIDERATION—COMPOUNDING FELONY NOT CONCLUSIVE OF RIGHT TO RECOVER MONEY PAID.—In *Bertschinger v. Campbell*, 168 Pac. 977, decided by Washington Supreme Court, the facts show that one physician played upon the fears of another physician to extort money from him in an alleged abortion case. In an action to recover the money extorted by the former from the latter, the trial court held that the evidence showed conclusively that the payment was voluntary and this precluded recovery. Motion for nonsuit being sustained on this theory, the Supreme Court reversed and remanded the cause.

After much discussion in which a state statute is cited making it a felony amounting to robbery for anyone to extort or gain money or property by accusing another of crime, the court said:

"It was suggested in oral argument, though not advanced in the briefs as a defense, that the payment of this money, under the circumstances as shown by appellant's evidence, was, in effect, the compounding of a felony, and for that reason the judgment of dismissal was not erroneous. This, upon the theory that the agreement was so tainted with wrong and illegality that the courts will not lend their aid to the enforcement of the right claimed by appellant. It hardly seems likely that respondent would, upon a new trial, care to invoke this defense, since it would imply that he was himself equally guilty of compounding the crime with which he charged appellant. That would seem to be an admission on his part that the money was received as well as paid, for that purpose. But even that theory would still leave open the question of appellant having paid the money under duress. Plainly a contract or settlement amounting to the compounding of a crime could be void because of duress as well as unenforceable because of being against public policy. If void because of duress it was not a binding contract or settlement under which appellant could retain the fruits thereof, even though it was also a contract which, but for the duress, would have been against public policy and as such could not be the foundation of any right to be asserted in the courts. The trial judge did not take the case from the jury upon this ground, but solely because he decided as a question of law there was not such duress as entitled appellant to recover the money paid. This is rendered plain by remarks

of the judge made in announcing his decision and preserved in this record. Clearly, it would have been erroneous for the trial court to have dismissed the action upon the ground that the payment of the money was for the compounding of a felony in view of the evidence produced in appellant's behalf."

In 86 Cent. L. J. 61, there was discussed the principle of "Recovery by Plaintiff Notwithstanding Participation in Fraud." There we dissented from the ruling of South Dakota Court sustaining the action upon the theory that the transaction infringed public policy, this was not aided by the ruling of South Dakota Supreme Court. With the Washington Supreme Court we heartily agree, not only because of the Washington statute, but also because proof of duress was evident, the trial court to the contrary notwithstanding.

LANDLORD AND TENANT—EVICTION BECAUSE OF UNGENTLEMANLY CONDUCT OF OTHER TENANT OF FLAT BUILDING.—Whether landlord and tenant relations may be affected by conduct of tenants in a building for flats or an apartment, where the form of lease to all tenants calls for gentlemanly conduct, is the question presented and decided in *Stewart v. Lawson*, 165 N. W. 716, decided by Michigan Supreme Court. It was held that in such a case the rule, that no act by a third party, not acquiesced in or encouraged by the landlord, interfering with quiet enjoyment, applied and there was no eviction barring landlord from demanding rent from an outgoing tenant removing without giving notice.

The court in treating this question relies on decision no doubt well settled, but it may be asked whether or not this ruling fits the case of flat and apartment dwellers. As to all such there are common rights in the land and common rights in halls and stairways or elevators and possibly in other parts of the general premises. The only real living apart of tenants is behind the doors of their particular rooms—and even as to these rooms there is an implied obligation to respect rights of other similar occupants.

In this case the ordinary form of lease provided that no family or visitors should use "foul, abusive or offensive language or become a nuisance to other tenants or neighbors," etc. Certainly it would seem that this clause should not be for exclusive advantage of lessor, but, if the understanding was that no other kind of letting would be allowed, a particular lessee would have the right to some sort of redress, if a landlord let upon any other terms or, if

having let, a lessee violated the provision. A tenant annoyed by such conduct would have the right to complain and if his complaint was not respected by an offender being put out, then himself could claim an eviction. Such a situation ought to be deemed somewhat analogous to that which would prevent a seller in a plan of restricted covenants as to buildings from selling to one without his being so restricted or vendee being allowed to disregard such covenants. Is another tenant such a third person as the ordinary rule refers to?

DIVORCE—DECREE IN ANOTHER STATE AS PRESUMPTIVE EVIDENCE IN PROSECUTION.—In *State v. Herren*, 94 S. E. 698, prosecution for bigamy, it was held by North Carolina Supreme Court, that a decree of divorce in another state did not estop the State of North Carolina from showing its invalidity on the ground that the defendant in such prosecution was never a bona fide resident of such other state, and such divorce was null and void.

In this case the defendant was first married in North Carolina and afterwards obtained a divorce in Georgia, where he married a second time. He then removed to North Carolina, where he and the woman he married the second time lived as man and wife. Defendant offered deposition to show that he was a resident of Georgia for one year preceding the beginning of the divorce proceeding as required by the laws of that state. There was constructive service only in the case. Reference is made to *Andrews v. Andrews*, 188 U. S. 14, as establishing the proposition that the state could show that there was no bona fide domicile in the state where the divorce was obtained, and to *Haddock v. Haddock*, 201 U. S. 573, that the faith and credit clause does not prevent inquiry into the jurisdiction of the foreign court rendering the decree. Further it was said that the states "have the right to determine what effect shall be given to the decrees of other states in this class of cases." *Atherton v. Atherton*, 181 U. S. 170; *Haddock v. Haddock*, *supra*.

A concurring opinion in the instant case says: "If the record in the divorce proceeding shows that the question of evidence was passed on, or it is recited in the decree, the presumption is in favor of the jurisdiction, and the burden is on the party attacking the decree to prove that the plaintiff was not a resident when it was granted, but, if there is no recital and no finding and the record shows

that the question of residence was not considered, the burden is on him who relies on the decree to prove residence, as otherwise it would not appear that the court had jurisdiction."

In this case the burden was put upon defendant to show residence. But if it was shown that the foreign court was one of general jurisdiction, why does it not follow that *omnia presumuntur rite acta?* It was said that in the trial "no issue as to residence was submitted to the jury nor is there any recital or adjudication in the decree, and, on the contrary, the language of the verdict and of the decree show that the cause for divorce was alone considered." We doubt very greatly whether the presumption of jurisdiction is thus displaced where the cause in a foreign state was there disposed of in a court of general jurisdiction. It, no doubt, is true that the finding of bona fide residence might be assailed, but this is another thing than saying that no presumption in favor of such residence did not obtain merely because recitals were not full.

hiring halls for their meetings as occasion arises; it has no creed other than the Bible; and in accordance with its interpretation of the methods of church government of the Early Apostolic Church never appoints or elects one to whom it applies the term minister. In fact the Association carefully avoid the word "Minister," its officebearers being designated elders, deacons, and Church Secretary. All elders are appointed for a period of six months, but can be reappointed on the expiry of that period. No elder of the Association receives any pay. He maintains himself by working at a secular occupation. The military authorities, while conceding that the Association was a religious denomination, maintained that its elders were not regular ministers in the sense of the statute. The Courts have sustained the contention of the military and declared these elders liable to military service.

EXEMPTION OF MINISTERS FROM MILITARY SERVICE.

The policy of the legislature in exempting clergymen from the duty of military service is contained in Exception 4 of the first Military Service Act of 1916, and is expressed in the words: "Men in Holy Orders or Regular Ministers of any religious denomination." That phrase has now been the subject of not a few very interesting judgments, one feature of which is the disclosure of a number of bodies, some of them practically unknown, holding what may, we hope without offense be called peculiar views. The first of these to come under judicial scrutiny was the International Bible Students' Association, regarding whom decisions in both England and Scotland have been given in this respect.¹ That body has no churches, simply

The exception it will be noted requires as a condition of exemption not only the status of "regular minister" but regular minister of a religious denomination. In *re a Mormon Elder Hawkes v. Moxley*,² the view had been taken in the inferior Court that the Latter Day Saints are not a "religious denomination," the principle ground for so holding having been that the Mormon Church did not appear in the Army Council's list of recognized religious denominations, also that they were a small body having only 50,000 adherents, and were, moreover, alien to Great Britain and practiced polygamy. On appeal these findings were overruled. It was pointed out that the Army Council's list of denominations was not conclusive; that as a body the Mormon Church was not so small as to be incapable of being regarded as a

(1) *Kipps v. Lane*, 33 T. L. R. 207; and *Guy and others*, 54 S. L. R. 540.

(2) 33 T. L. R. 308.

religious denomination; that though alien to Great Britain the same might be said of the Roman Catholics, the Greek, or the Lutheran Churches, and that as regards polygamy the fact appeared to be that that practice had been abolished by the Mormons a generation ago. The conviction against the appellant was accordingly quashed, and the case was sent back to the Justices to be reheard on the simple point whether or not he was a "regular minister" of the Mormon Church and so entitled to exemption.

In Kick v. Donne³ the man concerned, as in the cases of the International Bible Students' Association, worked at a secular occupation, in addition to being a minister. The body he served was the undenominational Church at the village Curry Rivell, which was a fellowship formed there as a result of a visit of the Faith Mission Evangelists. They believed in the Protestant Creed with adult baptism. Their minister preached, visited and baptised, but did not marry, all the marriages of the community being by civil ceremony. There was no other congregation of this undenominational Church, and that at Curry Rivell consisted of only fifty persons. Their minister was of military age, and the justices held regarding him that he was liable to serve in the army as the body in question was not a religious denomination within the meaning of the act. Their finding was not altered on appeal, the Lord Chief Justice remarking that he was not prepared to say that if the Justices found as a fact that the church referred to did not constitute a religious denomination, they had so found contrary to law.

A similar result was reached in In re Bratt.⁴ There the appellant was a missionary of Incorporated Seamen and

Boatmen's Friend Society, which had had thirteen mission stations and seven districts, and he had a congregation at Sheffield. At most of the mission stations the society had premises of its own, all of them being registered as places of worship, and most of them being licensed for marriages. There was no evidence to show that membership of the society was confined to members of any religious denomination. The number of members was limited to 100. Only persons connected with one of the branches of the Protestant Christian Church were eligible for election as members of the general committee or of a district committee. There were no trust deeds of the society to define its doctrine, and each missionary could preach any doctrine, the only restriction being a power of dismissal possessed by the general committee. The members of that committee belonged to various religious Protestant denominations. On a summons against the appellant for absenting himself from military service the justices found that the society was not a religious denomination; that the appellant's congregation was not a religious denomination, and that the appellant was not "a regular minister of any religious denomination; and they decided that he was liable to military service. On appeal it was held that the justices were right in concluding that the society was not a religious denomination, and their decision was affirmed.

All the foregoing decisions have been given by appellate courts and in consequence justices and magistrates in the inferior tribunals are following them, and, as is usual in lower courts, applying the precedent so as to extend its effect beyond what the official court might have anticipated and in the opinion of not a few, beyond what the statute possibly intended.

DONALD MACKAY.

Glasgow, Scotland.

(3) 83 T. L. R. 325.

(4) 143 L. T. J. 395.

LAWYERS AS SOLDIERS.

Our Supreme Court has declared that "this is a government of laws and not of men." Accordingly, lawyers ought to be the first to respond to our country's call in the event of the enforcement of law, national or international, through military power. From the days of the Revolution to the present time the legal profession has always been largely represented in every war. It is quite natural that it should be so. There is much similarity between litigation and warfare. If a lawyer is for the plaintiff he must plan and map out his lines of offense; there may be several ways to enforce his client's rights, each may have some advantage or drawback, but he must determine which course he will finally pursue. Often an error in planning a legal campaign will result fatally to the client's rights.

The same applies to the counsel for defense. He may intrench himself and say: "Drive me out!" or he may resort to offensive tactics, resulting in affirmative action to rout the attacking party. Likewise, there may be several ways of defeating the opposing party; the selection of any one may result in victory or defeat. By analogy this applies equally well to war.

A lawyer, to be successful, must develop aggressiveness, prudence, caution, boldness and skill in his work—the very elements that are essential to make a successful military commander. It therefore logically follows, that in every war a large number of the leaders have been members of the bar. To present only the names of the many lawyers who performed brilliant services for their country in time of war would be a list of endless pages. We can call attention to the record of only a few who, by extraordinary endowment, and because of wonderful success in the profession of arms, have become popularly known, and whose names are blazoned forth on the pages of history.

First and foremost is that dazzling genius, Alexander Hamilton, the friend and confidential adviser of Washington. Attaining rank as a general officer in the army, he later rose to the highest position among the lawyers of his time. In 1798, Hamilton was placed in chief command of all the armies; thus, rising from the lowest to the highest rank in the service. He has been a fine inspiration to every American youth, not only as a lawyer, as a master financier and statesman, but also as a brilliant military leader.

Winfield Scott, the idol of a nation for half a century, was educated for the bar. As a lieutenant at Lundy's Lane he greatly distinguished himself. His services during the Mexican War were of the highest class. He would have led the forces in the Civil War, but advanced age compelled his retirement.

Who has not heard of "Old Hickory," Andrew Jackson, the backwoods lawyer of Tennessee? Jackson was happiest when he had a scrap; whether fighting a duel, a lawsuit, Indians, or the country's enemies, he was ready to meet his opponent without a quaver. His skill and daring won the battle of New Orleans on January 8, 1815, which is, to this day, celebrated as "Jackson Day," the patron saint's day of the Democratic party.

We cannot overlook a lawyer who, during the bombardment of Fort McHenry, presented to this country its ever thrilling national anthem—The Star-Spangled Banner. Francis Scott Key served the people well and honorably in war as in peace.

The most remarkable character this country has yet produced was a captain in the Black Hawk War; a lawyer of great skill and force; a man of the finest sense of honor; a debater and orator of supreme ability; he was a friend of the poor and oppressed; he was a genius at story-telling; his fund of humor was inexhaustible, but under this all lay a homely brand of commonsense. In the hour of turmoil and trial the people exalted him to the greatest office

on earth; they elected him President of the United States and then he became, under our Constitution, Commander-in-Chief of the Army and Navy—Abraham Lincoln! During the years he occupied the White House he was often required to pass judgment upon military matters. His experience and training as a lawyer were of excellent service in conducting the great conflict. To his assistance he called another great lawyer, a man of stern military cast, Edwin M. Stanton, who was Lincoln's Secretary of War.

It was said of Stanton that the Constitution and laws never bothered him, nor stood in his way if it was necessary to override them to accomplish some military purpose. General Grant remarked of him, thus: "Owing to his natural disposition to assume all power and control in all matters that he had anything whatever to do with, he boldly took command of the armies, and, while issuing no orders on the subject, prohibited any order from me ever going out of the Adjutant-General's office until he had approved it."

Training at the bar is conducive to success in military leadership. A lawyer must exercise independent judgment; he must assume responsibility; he must know how to adapt himself to changed conditions, and be ever ready, and always on guard for the unexpected which may happen at any time. He must be prepared to meet defeat but never lose courage.

A course of study at the United States Military Academy is of inestimable value to high, independent command, but it is not indispensable. There are certain natural qualifications—temperament, quickness of perception, willingness to assume responsibility, undaunted moral as well as physical courage, which no amount of training can wholly develop and supply.

An illustration: At the northwest corner of the paarde ground is a statue of Major-General John Sedgwick, of the West

Point class of 1837, made of cannon captured by his men. He was killed in the Wilderness, May 9, 1864. Grant in his memoirs says this of him: "He was brave and conscientious. His ambition was not great, and he seemed to dread responsibility. He was willing to do any amount of battling, but always wanted someone else to direct."

As a contrast, Benjamin F. Butler, of Massachusetts, was always "cocksure" of everything. He never hesitated to assume any responsibility. He had no technical training, yet performed extensive and most valuable services, holding high command. That he made blunders, such as the Dutch Gap canal, must be admitted, but he did things. His training as a lawyer was of the greatest advantage in his military career.

Another instance from West Point was the brilliant General Godfrey Weitzel, who was second in the class of 1855. As an engineer he stood among the ablest; as a military commander he lacked initiative and daring. Weitzel was with the first expedition to Fort Fisher. He reported to his superior, General Butler, that "the fort cannot be taken by assault." Upon this report the attack was abandoned. Alfred H. Terry, a lawyer from Connecticut, was sent within a month to lead a second expedition. Terry had not the skill to calculate to a nicety how many troops were required to capture a certain number of men and guns, but he knew he was ordered to capture Fort Fisher, and so he took the fort. Terry was a fine type of citizen-soldier; he was beloved by his men. In his relation with other officers he stood well and became a Major-General of volunteers; later he was made a Brigadier-General in the regular army.

We should not omit General Lew Wallace. Educated for the law, he served as a lieutenant in Mexico. Then he returned to practice, but again entered the army and became a Major-General as a reward for meritorious service in the field. He was

from Indiana, becoming famous as an author and lecturer. Ben Hur and the Prince of India assured him fame as a writer.

Missouri furnished many capable military leaders. Perhaps Major-General Francis P. Blair, Jr., was the most conspicuous. He demonstrated that training for the bar and contending for the rights of clients was not at all unfavorable, but rather conducive to the making of a good General. General Grant was always candid and fair in his estimate of the various officers who served under him. In a lengthy article on "The Vicksburg Campaign," he says of General Blair: "I had known Blair in Missouri, where I had voted against him in 1858 when he ran for Congress. He was always a leader. I dreaded his coming. I knew from experience that it was more difficult to command two generals desiring to be leaders, than it was to command one army officered intelligently and with subordination. It affords me the greatest pleasure to record now my agreeable disappointment in respect to his character. There was no man braver than he, nor was there any who obeyed all orders of his superior in rank with more unquestioning alacrity. He was one man as a soldier, another as a politician."¹

Illinois alone furnished a score of highly distinguished Generals from the bench and the bar. Chief among them were John M. Palmer, John A. McClernand and James Shields. There was, however, a member of the Illinois bar, who practiced in the same court with Lincoln. He possessed meteoric brilliancy as a lawyer, statesman and soldier; he came to this country as an immigrant at the age of nine. By dint of native ability and work he accomplished wonders. Admitted to practice, he soon after commanded a brigade successfully at Cerro Gordo; was elected to the Senate from Oregon; became famous for his classic and patriotic orations, and gallantly fell, leading

a brigade at Ball's Bluff, October 21, 1861. This was Edward D. Baker! He was appointed Brigadier-General of volunteers, August 6, 1861, which he declined; on September 21, 1861, he was honored with the office of Major-General. At that time there was only one other who held that exalted rank in the Army of the Potomac—General George B. McClellan.

Space will not permit reference to many others, but we cannot omit the names of Rutherford B. Hayes, James A. Garfield, Chester A. Arthur and Benjamin Harrison, all lawyers of great ability, and distinguished for their valor and their loyalty; each one was rewarded with the coveted star of a General.

Of all the lawyers to achieve undying fame, General John A. Logan was the most conspicuous. Because of his striking personality he was known as "Black Jack." Serving in Mexico with distinction as first lieutenant, he attained to the high command of the Army of Tennessee, as Major-General, upon the death of General James B. McPherson, July 22, 1864. Logan was successful in every battle he commanded. He obtained higher command than any other officer not trained at West Point.

After McPherson fell, Logan successfully carried on the second Battle of Atlanta; nevertheless, General O. O. Howard was promoted over him. Many an officer would have been peeved, and sulked, but not he: faithfully and loyally he bided his time and completely vindicated himself in "The Volunteer Soldier of America," published in 1887.

It seems that General Sherman's reason for superseding Logan was because Logan returned to Illinois to look after politics. Sherman was a strict disciplinarian, had no love for "political Generals," and so he resented this by promoting Howard. The fact is, Logan went to Illinois at the urgent request of the President, but rather than

(1) *3 Battles and Leaders*, 537.

betray the confidence of Lincoln, he quietly suffered the stinging rebuke of being classed as a "political soldier," and cheerfully served under Howard, a West Pointer, a good soldier, but far inferior in natural ability.

One more lawyer, and the roll is ended. John A. Dix was Secretary of the Treasury in 1861. The message that had a genuine ring to it and caused immense enthusiasm read like this: "If any man attempts to haul down the American flag, shoot him on the spot." He was born for command, finally becoming a Major-General.

The Military Academy was established in 1802. Since then about 6,000 have graduated from this institution; probably not over 1,200 are on the army roster in active service. It is evident if we mobilize, equip and place in action an army of millions, that by far the larger number of officers must be supplied from civil life. The legal profession, engineering in its various branches, those trained in polytechnic schools, the medical calling, and other skilled vocations will have to supply this demand for trained leaders.

In proportion to numbers it is likely that the law will, as in the past, be more largely represented than any other learned profession. In every battle in our history, the lawyers have cheerfully taken an active and conspicuous part. Whether on the plateaus of the Cordilleras, in the jungles of the Philippines, or on the high seas, they have ever been valiant and loyal, and carried the Stars and Stripes invariably to victory.

In the present conflict the bench and bar will offer more than its proper quota, either as privates or as commissioned officers. Taking the past as a guide it is certain that, wherever they go, they will add luster and renown to this great republic; and the pages of its history will be further illuminated with their devotion to duty, their courage,

their faithfulness to every trust and obligation, and by their deeds of imperishable glory!*

FRED H. PETERSON.

Seattle, Wash.

*After reading this interesting account of lawyers who have become successful as soldiers, it has occurred to the editor that it would be interesting to know what lawyers have entered the military service as officers. In this, the greatest of all wars, there can be no doubt that many American lawyers are going to win fame on the field of battle. And in anticipation of such results and in grateful recognition of the sacrifices such lawyers are making, the Central Law Journal is willing to publish the names of all lawyers holding officers' commissions now serving in the American or Allied armies.—Editor.

TAXATION—STOCK DIVIDEND IS INCOME.

HARRY R. TOWNE v. MARK EISNER,
COLLECTOR.

38 Sup. Ct., 158, January 7, 1918.

Stock dividend not taxable under act of Oct. 3, 1913, R. S. U. S., providing that "the net income of a taxable person shall include gains, profits, and income derived from interest, rent, dividends, securities or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever," as the declaration of such a dividend adds nothing to the proportional interest of the stockholder.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit to recover the amount of a tax paid under duress in respect of a stock dividend alleged by the Government to be income. A demurrer to the declaration was sustained by the District Court and judgment was entered for the defendant. 242 Fed. Rep. 702. The facts alleged are that the corporation voted on December 17, 1913, to transfer \$1,500,000 surplus, being profits earned before January 1, 1913, to its capital account, and to issue fifteen thousand shares of stock representing the same to its stockholders of record on December 26; that the distribution took place on January 2, 1914, and that the plaintiff received as his due proportion four thousand one hundred and seventy-four and a half shares. The defendant compelled the plaintiff to pay an income tax

upon this stock as equivalent to \$417,450 income in cash. The District Court held that the stock was income within the meaning of the Income Tax of October 3, 1913, c. 16, Section II; A, subdivisions 1 and 2; and B. 38 Stat. 114, 116, 167. It also held that the Act so construed was constitutional, whereas the declaration set up that so far as the Act purported to confer power to make this levy it was unconstitutional and void.

The Government in the first place moves to dismiss the case for want of jurisdiction, on the ground that the only question here is the construction of the statute not its constitutionality. It argues that if such a stock dividend is not income within the meaning of the Constitution it is income within the intent of the statute, and hence that the meaning of the Sixteenth Amendment is not an immediate issue, and is important only as throwing light on the construction of the Act. But it is not necessarily true that income means the same thing in the Constitution and the Act. A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used. *Lamar v. United States*, 240 U. S. 60, 65. Whatever the meaning of the Constitution, the Government had applied its force to the plaintiff, on the assertion that the statute authorized it to do so, before the suit was brought, and the Court below has sanctioned its course. The plaintiff says that the statute as it is construed and administered is unconstitutional. He is not to be defeated by the reply that the Government does not adhere to the construction by virtue of which alone it has taken and keeps the plaintiff's money, if this Court should think that the construction would make the Act unconstitutional. While it keeps the money it opens the question whether the Act construed as it has construed it can be maintained. The motion to dismiss is overruled. *Billings v. United States*, 232 U. S. 261, 276. *B. Altman & Co., v. United States*, 224 U. S. 583, 596, 597.

The case being properly here, however, the construction of the act is open, as well as its constitutionality if construed as the Government has construed it by its conduct. *Billings v. United States, ubi supra*. Notwithstanding the thoughtful discussion that the case received below we cannot doubt that the dividend was capital as well for the purposes of the Income Tax Law as for distribution between tenant for life and remainderman. What was said by this

Court upon the latter question is equally true for the former. "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished and their interests are not increased. * * * The proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." *Gibbons v. Mahon*, 136 U. S. 549, 559, 560. In short, the corporation is no poorer and the stockholder is no richer than they were before. *Logan County v. United States*, 169 U. S. 255, 261. If the plaintiff gained any small advantage by the change, it certainly was not an advantage of \$417,450, the sum upon which he was taxed. It is alleged and admitted that he receives no more in the way of dividends and that his old and new certificates together are worth only what the old ones were worth before. If the sum had been carried from surplus to capital account without a corresponding issue of stock certificates, which there was nothing in the nature of things to prevent, we do not suppose that any one would contend that the plaintiff had received an accession to his income. Presumably his certificate would have the same value as before. Again, if certificates for \$1,000 par were split up into ten certificates each, for \$100, we presume that no one would call the new certificates income. What has happened is that the plaintiff's old certificates have been split up in effect and have diminished in value to the extent of the value of the new.

Judgment reversed.

Mr. Justice McKenna concurs in the result.

NOTE.—Stock Dividend as Taxable Income.—In the instant case Justice Holmes determines that the income tax act of Oct. 3, 1913, which provides that: "The net income of a taxable person shall include gains, profits and income derived from * * * interest, rent, dividends, securities or the transaction of any lawful business carried on for gain or profit, or gains or profits and income derived from any source whatever," includes dividends of the natural sort and not those irregular in their nature, such as stock dividends, because this kind of dividend takes nothing from and adds nothing to the interest of the shareholder. Therefore this ruling reverses *Towne v. Eisner*, 242 Fed. 702, which held that a stock dividend puts the stockholders in a materially different situation than had the amount thus distributed been paid in cash.

What was said by Judge Hand in the lower court on this subject was, as follows: "I can give

little weight to the argument that the issue of this stock dividend did not affect the market value of the plaintiff's aggregate holdings and that the distribution of 50 per cent more stock to the stockholders lessened the price of their original stock 33½ per cent. This would be true in case of any cash dividend, extraordinary or even ordinary. The cash distributed, plus the market value of the stock after the dividend was paid, would ordinarily be equivalent in value to the stock before the dividend. But the objection seems impressive that the transaction in no wise affected what the stockholder already had, except to give him additional pieces of paper evidencing his ownership. He does, however, have something different before and after receiving the additional stock. What was before a mere chance that he might receive his share of the surplus in cash dividends and a vague right to secure them if the directors withheld them in a way and to an extent that indicated bad faith is now converted into a permanent interest in the capitalized surplus. He has lost the chance of cash dividends and gained an interest in the corporate enterprise that cannot be taken away. This interest is derived from earnings and may be really of much greater advantage to the stockholder than the possibility or right which he has lost. It becomes capital of the corporation, but in his hands it is income, and in many respects resembles the common extraordinary cash dividend, accompanied by a right to subscribe for additional stock at par to an amount equivalent to the dividend in cash. To say that this distribution is not income, because he received no cash and the intermediate step is not taken, is, to my mind, quite to disregard the real nature of the transaction."

To me this reasoning appears very convincing. Suppose a corporation has a surplus and there is a question of its distribution. The natural way is to pay it over to stockholders in cash. But for its own purposes, the corporation elects to issue a stock dividend and thus capitalize this surplus. If this course is fairly the alternative of cash, then it would not be wrong to permit stockholders to elect between taking cash or new stock. At bottom, then, the taking of a stock dividend would make stockholder taking cash with one hand and with the other investing it in new stock. The fact that the new stock is not put upon the market is not controlling. The preference right in stockholders to acquire this stock is not affected, if he takes the cash with an understanding that he is to reinvest the whole or any part of it in the new stock.

The cases in which this question has been considered are those in which there is litigation between life tenants and remaindermen. There have been three ways in which American courts have been divided on this question, the Massachusetts way (also the English view) which "regards all cash dividends, however large, as income, and stock dividends, however small, as capital." A few states have followed this rule. A greater number of states make stock dividends apportionable to corpus and income accordingly as the surplus upon which they are based, accumulated before or after the stock constituted the corpus of a trust estate, and still another view regarded all dividends, cash or stock, as income belonging to the life tenant.

Justice Holmes cuts through all refinements and differences between the courts by declaring, that as a stock dividend leaves stockholders having the same proportional interest after as before, nothing in effect has been done in declaring a stock dividend. *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. ed. 525.

The opinion in that case showed a controversy between a life tenant and trustee of the corpus. The opinion was by Justice Gray, who held broadly that all property remains that of the corporation until it is distributed among stockholders by the corporation. It "may treat it and deal with it either as profits of its business or as addition to its capital" and may distribute its earnings at once to the stockholders as income or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years, or it may retain portions of its earnings and allow them to accumulate and invest them in its own works and plant, so as to secure and increase the permanent value of the value of the property." Then it is stated that whichever course is taken by the corporation in good faith ends the matter.

But does this end the matter so far as a life tenant and a remainderman is concerned? Could not a testator or trustor have his desire respected so as to apportion between a life tenant and a remainderman? The court, further along, admits that by special direction this could be done. And could not the government say, that income should comprise what was declared in the way of a dividend, cash or stock, as of profits by a corporation within a taxable year? Why should dividends by a corporation, acting merely in furtherance of its policy, prevent incidence of a tax upon income, because, though it really is earned yet it is distributed not in cash but in the equivalent for cash? I do not greatly admire the short-cut way to a conclusion, that the Supreme Court has adopted. The way a minority of American courts have looked at this matter is virtually adopted, because a former Massachusetts judge has made corporate action operate, and another former Massachusetts judge upholds him. When the sense in which a federal statute is to be taken it would seem more appropriate, if state decision is to be looked to, to regard the predominant view in state ruling. That the apportionment theory is such view, as for example the courts of New York, New Jersey, New Hampshire, Pennsylvania, Maryland, Wisconsin and some other states, quite clearly appears. See 82 Cent. L. 115, where this question receives consideration, also 55 C. L. J. 444.

Furthermore, this ruling seems opposed to the principle that exemption from taxation must be clear, all presumptions being in favor of the taxing power. In this case departmental rulings were set aside. They were entitled to some respect. It is to be noted that the War Act of October 3, 1917, expressly concludes this question in favor of the tax. Sec. 1211, sub-section 31, of the War Revenue Act provides as follows:

"That the term "dividends" as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint-stock company, association, or insurance company, out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock

of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of the earnings or profits so distributed."

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 143.

Bankruptcy; Relation to Client; Employment—Lawyer having claim for professional services against client who is willing to be adjudicated a bankrupt, joins with other creditors in a petition of bankruptcy against client, and represents said client as attorney in bankruptcy proceeding; disapproved.—For the past three years I have performed professional services for A. B. and have received no fees, knowing that he was in financial difficulties.

Early this year, his financial difficulties became so acute, that I advised him to file a petition in bankruptcy. This he refused to do, but said that he would not object if some of his creditors petitioned him into bankruptcy.

I took this matter up with the attorney for a bank, to which my client owed money on notes due and to become due. The attorney for the bank thought that it was best to put him through bankruptcy, and offered to make the bank one of the petitioners, provided I would secure the other necessary petitioners. I thereupon asked A. B.'s son to get another petitioner, which he did; and I signed as a third petitioner upon my claim (in a reasonable amount) for legal services. The attorney for the bank is the attorney for the petitioners in the bankruptcy proceeding.

Should I, under the circumstances, have joined in the petition?

Can I, now that the petition has been filed, properly act as attorney for the bankrupt in the bankruptcy proceeding?

ANSWER No. 143.

In the opinion of the committee, any situation in which an attorney occupies a position even formally hostile to that of his client, is so liable to abuse, that it should in general be discouraged.

There is nothing in the question to indicate that there were such exceptional elements in

the case presented as would take it out of the general rule.

The committee, therefore, while assuming that the inquirer has acted in good faith, with his client's consent, and for the latter's benefit, is nevertheless of the opinion that the inquirer should not have become a petitioning creditor while remaining the legal adviser of the bankrupt; and that having become a petitioning creditor, he should not act as attorney for the bankrupt.

QUESTION No. 144.

Relation to Third Person—Sale of land by lawyer to layman (not his client) without disclosure of liens; disapproved.—A lawyer owns a large parcel of land which, to his knowledge, is subject to a first and a second mortgage. He sells a small portion of the land to a layman, not his client. In the course of the negotiations, it transpires that the layman knows of the existence of the first mortgage, and is willing to assume the risk of having to provide for that mortgage if it should be called; but that he is ignorant of the existence of the second mortgage. The lawyer does not inform the purchaser that there is a second mortgage, nor does the latter otherwise ascertain the fact until after he has completed the purchase, when a suit to foreclose the second mortgage is begun. The purchaser did not cause the title to be searched before buying?

Was the lawyer guilty of a breach of professional duty in failing to disclose the existence of the second mortgage?

ANSWER No. 144.

Despite the fact that the lawyer may not have been acting in a professional capacity, it is the opinion of the committee that he dishonestly imposed upon the vendee, and that his conduct was not only improper, but unprofessional.

BOOK REVIEW.

UNITED STATES STATUTES ANNOTATED, VOL V.

In 85 Cent. L. J. 87, we published a review of the first four volumes of United States Statutes Annotated, these being all then extant of the ten volumes of which the work is to consist. Now there has reached our table Volume V of this work. The contents of this

volume take in Bankruptcy and Internal Revenue.

These subjects are arranged in chapters and sections with exhaustive annotation of the latter. Additionally there appears an annotation of general orders and forms where passed upon, and upon the whole this volume presents a compendium of statute law and judicial decision not only useful, but absolutely necessary for the practitioner.

This work as we pointed out in our review of the four volumes above referred to, comes from the law book company of T. H. Flood & Co., Chicago, 1917.

CLARK'S CRIMINAL PROCEDURE,
2nd EDITION.

Mr. Wm. E. Mikell, Professor of Law in the University of Pennsylvania, produces a second edition of Clark's Criminal Procedure, the first edition appearing in 1895. During the period intervening between the first and second editions there has been a very great change in the law of criminal procedure, as much in statutory enactment as by judicial advance. This is evidenced especially as to technical requirement as much as anything else. All of this is noted in this second edition of a well-known work, and many important cases have been added, along with new notes, by the editor of this second edition.

The present work is presented in excellent typographical form and binding in law buckram, and hails from the West Publishing Company, St. Paul, Minn., 1918.

BOOKS RECEIVED.

A Treatise on the Law of Public Service Companies, Property Devoted to Public Use, Business in Public Employment, Carriers in Interstate Transportation and Regulation by Public Service Commissions; with an Annotated Appendix Containing Procedural Parts of Commission Laws of the Several States. By Needham C. Collier, LL.D., of the St. Louis Bar; formerly Associate Justice of the Supreme Court of the Territory of New Mexico, Editor of Central Law Journal. 1918. The F. H. Thomas Law Book Co., St. Louis. Price \$7.50. Review will follow.

HUMOR OF THE LAW.

In a Western court not long ago the Judge, of Celtic extraction, addressed a frequently convicted prisoner in these terms:

Are you aware that for these repeated breaches of the law it is in my power to sentence you to a term of servitude far exceeding your natural life, and that, furthermore, I am very much inclined to do it?"

A certain mayor once rose to make a speech. And after talking for three-quarters of an hour began to wind up with the words:

"And it is my greatest wish that the government shall all hang together."

"Hear, hear!" cried a voice in the crowd.

"I don't mean in the sense in which the idle scoffer in the crowd would have you understand," went on the mayor with dignity, "but that they may hang together in concord and accord!"

"I don't care what kind o' cord it is," came the voice again, "as long as it's a strong cord!"

And the mayor gave it up.

Not long since in a Federal court, there was present a lawyer from a small town, who had a lot of foreigners, who wanted to get "acclimatized." He put them up and asked two or three formal questions, and then the trial judge asked one or two, and the order was taken in each instance. Finally he put up one, and for some reason or other the trial judge asked this question: "Where in this country does United States authority leave off and State authority begin?" This poor dago made an awful mess of answering it, about as much of a mess as the ordinary law student would. When the applicant got through, the lawyer said to the court: "Your Honor, you have heard the questions and answers; we think that he is entitled to citizenship." The judge said: "Very well but do you think that he thoroughly understood the distinction between State and Federal authority?" "Well, Your Honor, I am sure that he does, but the applicant was excited and he could not tell it." "Well," said the judge, "if you think that he knows, I would be glad for you to call him back, and let him tell it, for that is a matter that has puzzled the court for about forty years." The lawyer, with much embarrassment took his seat, and of course the foreigner was given citizenship.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

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1. **Adjoining Landowners—Excavations.**—Act 1871 3 Comp. St. 1910, (p. 3926), requiring that one excavating more than eight feet deep in his own land shall support his neighbor's wall on adjoining land, if licensed to enter thereon for that purpose, imposes an absolute requirement, and reasonable care alone is insufficient.—Hirschberg v. Flusser, N. J., 102 Atl. 358.

2. **Adverse Possession—Statute of Limitations.**—A grant by the owner of land for the purpose of building a schoolhouse was for a public and not a private use against which limitations did not run in favor of adverse possessor.—Reutler v. Ramsin, N. J., 102 Atl. 351.

3. **Arbitration and Award—Subject Matter.**—Where church building constructed by contractor was defective and the foundation fell, and the contractor refused to make repairs, but the parties made an agreement for arbitration of the dispute, submitting all matters in dispute, the various liabilities of the parties in removing dirt, shoring up the superstructure, and in rebuilding and tying the foundations, were all subject to the arbitration.—Young v. Society of First Congregational Church of Verona, N. J., 102 Atl. 358.

4. **Bailment—Expense by Bailee.**—One hiring a horse for an indefinite period could not recover from owner expense of its cure without owner's knowledge, where owner was accessible, and there was sufficient time before expense was incurred to have notified him so that he could

have retaken horse.—Smarak v. Segusse, N. J., 102 Atl. 354.

5. **Bankruptcy—Composition.**—Proposed composition, whereby bankrupt agreed to pay creditor sum expended in investigating bankrupt's financial condition, in addition to its pro rata share, cannot be confirmed.—In re M. & H. Gordon, U. S. D. C., 245 Fed. 905.

6. **Banks and Banking—Conversion.**—Bank having received as deposit and credited check payable to guardian as such to his individual account, and accepted check on such account for payment of guardian's debt to bank, held, that bank was liable to extent that it profited by conversion of trust fund.—Brovan v. Kyle, Wis., 165 N. W. 382.

7. **Statutory Liability.**—Payments by shareholder savings banks to receiver of a national bank to aid in payment of national bank's liabilities held to have been made with intention that they should be applied to diminish the statutory liability of the shareholder banks.—Korby v. Springfield Inst. for Savings, U. S. C., 38 S. Ct. 88.

8. **Brokers—Commission.**—Where inception of exchange of lands, and development up to time agent injected himself by telephoning owner of one tract he had found a man to exchange was due to agent for another owner, first agent cannot cut initiating agent out of commission.—Swaney Land Co. v. Bradford, Iowa, 165 N. W. 362.

9. **Fraud.**—Realty broker's petition, based on violation of defendant's contract to pay commission, and not upon fraud of defendant in trying to cover up sale to third person, did not have to allege fraud.—Luzzadder v. McCall, Mo., 198 S. W. 1144.

10. **Carriers of Goods—Void Condition.**—Conceding contract between common carrier and logging company, allowing carrier to use rails of logging company on condition that it should haul no pine logs for any other than the logging company, was void as to the condition, it afforded no basis for requiring the carrier to haul pine logs for another person.—Alabama Cent. R. Co. v. Alabama Public Service Commission, Ala., 76 So. 862.

11. **Warehouseman.**—If goods arrive over initial and connecting line, and are so delivered to final carrier, which transports them to destination and holds them there for reasonable time for delivery to consignee, its liability as a carrier ceases, and no negligence thereafter could be charged to the initial or connecting carrier.—Adams Seed Co. v. Chicago Great Western R. Co., Iowa, 165 N. W. 367.

12. **Carriers of Passengers—Non-Suit.**—Where one intending to board a train at a station stood on side of track opposite station platform between main track and standing freight cars, and was knocked down by one attempting to board train and was fatally injured, there should have been a non-suit, or a directed verdict for defendant carrier.—Kalleberg v. Raritan River R. Co., N. J., 102 Atl. 350.

13. **Chattel Mortgages—Unlawful Ejection.**—Chattel mortgagee's conduct in taking possession of stock of goods, after failure of plaintiff

to make payments as provided in mortgage, held to amount to a forceful and unlawful ejection, so that defendant was guilty of conversion of plaintiff's property not covered by mortgage, although plaintiff made no demand therefor.—*Butcher v. Bell*, Mo., 198 S. W. 1123.

14. **Commercee**—Burden on.—Permit and franchise taxes imposed on foreign corporations by Rev. St. Tex. 1911, arts. 3837, 7394, the amount of which are based on capital stock, held a direct burden on interstate commerce.—*Looney v. Crane Co.*, U. S. S. C., 38 S. Ct. 85.

15.—Burden on.—Tax imposed by Act Pa. May 2, 1899 (P. L. 184), on dealers in merchandise so far as it is measured by gross receipts, from merchandise shipped to foreign countries is a direct burden on foreign commerce in violation of Const. art. 1, § 8.—*Crew Levick Co. v. Commonwealth of Pa.*, U. S. S. C. 38 S. Ct. 126.

16.—Intoxicating Liquors.—Interstate Commerce Act Feb. 4, 1887, § 15, as amended by Act June 18, 1910, § 12, prohibiting disclosure of information respecting shipments, held not paramount to state legislation in respect to shipments of intoxicating liquors in view of the Webb-Kenyon Law.—*Seaboard Air Line Ry. v. State of North Carolina*, U. S. S. C., 38 S. Ct. 96.

17. **Constitutional Law**—Due Process of Law.—The Fourteenth Amendment to the federal Constitution, relating to deprivation of property without due process, has no application where the action complained of is not the action of a state.—*Jones v. Buffalo Creek Coal & Coke Co.*, U. S. S. C., 38 S. Ct. 121.

18.—Due Process of Law.—Order of public service commission, requiring gas company to extend pipes to rapidly growing settlement 1½ miles from its mains, held not arbitrary or capricious, so as to constitute a denial of due process of law.—*People of State of New York ex rel. New York & Queens Gas Co. v. McCall*, U. S. S. C., 38 S. Ct. 122.

19.—Espionage Act.—So-called Espionage Act June 15, 1917, §3, is valid under Const. U. S. Amend. 1, and circulation of pamphlets containing false statements calculated to interfere with military operations of United States cannot be justified as exercise of freedom of speech.—*United States v. Pierce*, U. S. D. C., 245 Fed. 878.

20.—Police Power.—Under Fourteenth Amendment federal Supreme Court cannot supervise state legislation, in the exercise of the police power beyond protecting against laws of an arbitrary character, having no reasonable relation to the execution of lawful purposes.—*Jones v. City of Portland*, U. S. S. C., 38 S. Ct. 112.

21.—Rules of Evidence.—A legislature may prescribe rules of evidence declaring what proof may be admitted, subject to only restriction that prescribed rules shall not interfere with exercise of any natural, common-law, or constitutional rights of accused.—*State v. Tincher*, W. Va., 94 S. E. 503.

22. **Corporations**—Estoppel.—That creditors extend credit to a concern as a corporation does not estop them from enforcing personal liability of its stockholders for failure to file affidavits of

treasurer required by Gen. St. 1906, § 2652.—*Charles v. Young*, Fla., 76 So. 869.

23.—Taxation.—Rev. St. Tex. 1911, art 3837, requiring foreign corporation to pay tax for permit to do business in the state based on capital stock, held invalid as applied to non-resident corporation engaged in both interstate and intrastate commerce.—*Looney v. Crane Co.*, U. S. S. C., 38 S. Ct. 85.

24. **Damages**—Presumption.—In action for damages by threatened assault of defendant's servant upon plaintiff, direction of verdict on actual damages for defendant and instruction that nominal damages were presumed from the invasion of plaintiff's rights were not inconsistent.—*Jones v. Atlantic Coast Line R. Co.*, S. C., 94 S. E. 490.

25.—Violation of Contract.—When a party makes a contract and then notifies the other contracting party that such contract is made with reference to a contract already entered into or contemplated between him and a third party, he is not confined to ordinary damages for violation of the original contract.—*Asher v. E. S. Howard & Sons*, Ky., 198 S. W. 1149.

26. **Dedication**—Implied Authority.—Dedication of land for street impliedly authorizes city to grade it so as to make it convenient as a highway, and though grading may impair dedicator's rights of ingress and egress to abutting lot, he has no action for such injury.—*Hickman v. City of Clarksburg*, W. Va., 94 S. E. 501.

27. **Deeds**—Consideration.—In suit by heirs to set aside conveyance, that land was worth over \$5,000, and that cash consideration was only \$250, held not to warrant reversal of judgment, denying relief where the contract also imposed on the grantee the duty of caring for deceased.—*Flynn v. Moore*, Iowa, 165 N. W. 351.

28. **Divorce**—Cruel Treatment.—Conduct included in the phrase "cruel and inhuman behavior" as a ground for divorce is relative in its application, and, if from disease the wife does things which she would not otherwise have done, such acts should not bar her right to divorce where the husband failed to make any allowance for her affliction.—*Stepp v. Stepp*, Ky., 198 S. W. 935.

29.—Estoppel.—Where plaintiff obtained a divorce and both parties remarried and after eight years the husband died leaving a widow and children, the plaintiff is estopped to ask annulment of the divorce on the ground that her husband forced her by threats to get the divorce.—*Barnett v. Miller*, Ark., 198 S. W. 873.

30. **Electricity**—Anticipation of Injury.—Maintaining electric light and power plant transmitting 33,000 volts over wire constructed over public road, without ammeter, circuit breaker, or ground detector, is gross negligence, and the operators must be held to have anticipated severe shock or death from breaking of wire without shutting off the current.—*Abeline Gas & Electric Co. v. Thomas*, Tex., 198 S. W. 1027.

31. **Eminent Domain**—Esthetic Theory.—A limitation upon an owner's use of his city property cannot be imposed, merely to effect sym-

metry or ornamentation of a city, street, or section, otherwise than under the power of eminent domain, allowing compensation, if at all.—*State v. Stahlman*, W. Va., 94 S. E. 497.

32.—Statutory Construction.—Rev. St. 1909, § 5583, as amended by Laws 1913, p. 272, if construed to require organization of drainage districts where majority of acreage owners petition therefor without judicial inquiry as to necessity, would violate Const. art. 2, § 20, by taking private property for private use.—*State ex rel. Clarke v. West*, Mo., 198 S. W. 1111.

33. Exemptions—Head of Family.—A divorced husband who marries again is the head of a family within Code, § 4011, exempting certain wages of the head of a family from liability for debt.—*Schooley v. Schooley*, Iowa, 165 N. W. 337.

34. Explosives—Evidence.—In action for injuries by explosion of dynamite kept in street, when it is determined that such nuisance was maintained, no particular causal act of negligence directly contributing to explosion need be shown.—*Holman v. Clark*, Mo., 198 S. W. 868.

35. Food—Inspection.—Louisville ordinance, requiring inspection of meat, "arriving for sale," requires inspection of meat inspected by the United States in Chicago and shipped into Louisville on orders previously made, where the seller is in charge during the shipment and until actual delivery to the purchasers.—*Boyd v. City of Louisville*, Ky., 198 S. W. 927.

36. Fraudulent Conveyance—Burden of Proof.—Defendants in suit to set aside a deed as in fraud of creditors, on complainant proving there were creditors when it was made, have the burden of showing consideration; recital in deed and denial of answer not avail.—*Strickland v. Stuart*, Ala., 76 So. 867.

37.—Inadequate Consideration.—If a husband was honestly indebted to his wife, and the conveyance was made in good faith in payment of such debt, and the consideration was not grossly inadequate, it was not fraudulent as to creditors of the husband.—*Crenshaw v. Halvorsen*, Iowa, 165 N. W. 360.

38. Gaming—Statutory Construction.—A machine in which nickels or trade checks could be inserted, and which would deliver sometimes a package of gum, sometimes nothing, sometimes a package of gum with one or two trade checks, and sometimes several trade checks, is a machine prohibited by Ky. St. § 1967, denouncing offense of keeping a gaming machine.—*Allen v. Commonwealth*, Ky., 198 S. W. 896.

39. Habeas Corpus—Selective Draft.—Under Selective Draft Act, § 2, 4, 5, and Rules and Regulations, § 18, 20, relator, nondeclarant alien, who did not claim exemption from military service within seven days after notification, held to have had a fair hearing before local and district boards, which certified him for military service, and hence not entitled to habeas corpus on that ground.—*United States v. Finley*, U. S. D. C., 245 Fed. 871.

40. Highways—Automobile.—In action for injury when struck by automobile, omission of operators of car to stop and give their names and owner's name and address could not be considered by the jury, since it in no way contributed to the injuries.—*Henderson v. Northam*, Cal., 168 Pac. 1044.

41. Homestead—Impressed Trust.—The mere fact that the husband, when he married, had the intention at some time to occupy as a homestead the land involved in a subsequent trust deed, did not impress it with the character of a homestead, where in fact such intention was never consummated.—*Murphy v. Lewis*, Tex., 198 S. W. 1059.

42. Husband and Wife—Community Property.—Where husband, when he abandoned wife sold community personality, and appropriated proceeds as his share of community estate, delivering to wife community realty as her share, wife had equitable title to realty or exclusion of interest by husband.—*Mother Mary Angela v. Battle*, Tex., 198 S. W. 1030.

43.—Pleading and Practice.—Where husband when sued for goods sold wife alleged that she had abandoned him without his fault, portions of petition in wife's action for divorce showing cruel treatment held admissible under the pleadings.—*Sanger Bros. v. Trammell*, Tex., 198 S. W. 1175.

44. Indictment and Information—Evidence.—Although it was not necessary to allege upon what street accused drove his automobile at an unlawful rate of speed, yet where a certain street was alleged, it was necessary to prove it was on that particular street.—*White v. State*, Tex., 198 S. W. 964.

45. Injunctions—Interference with Employees.—That employees were at liberty to quit the employment at pleasure did not deprive the employer of its right to injunctive relief against interference with its employees by third persons seeking to unionize them.—*Eagle Glass & Mfg. Co. v. Rowe*, U. S. S. Ct., 38 S. Ct. 80.

46.—Mandatory.—Defendant in possession under bona fide claim of title cannot be summarily removed by mandatory injunction, especially where there was no averment that irreparable damage would be done.—*Russel v. Town of Hickory*, Miss., 76 So. 825.

47.—Union Labor.—Right to injunction against activities of one attempting to secure support of employees to enable those who he represented to close the employer's mine unless he would make it a union mine held not dependent on whether such person had power or authority to shut down the mine.—*Hitchman Coal & Coke Co. v. Mitchell*, U. S. S. C., 38 Sup. Ct. 65.

48. Insurance—Accidental Means.—Loss of sight in eye from embolus or floating clot due to plaintiff's general condition, but possibly aggravated by his intentionally lifting goods, is not covered by policy insuring against injuries sustained through accidental means, and resulting exclusively of other causes in disability.—*Salinger v. Fidelity & Casualty Co. of New York*, Ky., 198 S. W. 1163.

49.—Constitution and By-Laws.—Insurance contract with mutual benefit society providing insurance is granted subject to constitution and by-laws existing or as amended permits any reasonable change by amendment or adoption of by-laws increasing or decreasing dues and assessments, etc.—*Butler v. Eminent Household of Columbian Woodman*, Miss., 76 So. 830.

50.—Estoppel.—That surviving widow listed insurance policy, payable to estate as part of its assets, and so referred to it in her claim for allowance of support, did not, as against intestate's surviving sister, estop widow from thereafter asserting a claim in good faith to whole proceeds of policy.—*Ensign's Estate*, Iowa, 165 N. W. 318.

51.—Payment of Premium.—Where policy did not require payment of premiums in cash, or exclude idea that they might be paid by note, proof of payment by note was not objectionable within Ky. St. § 656, prohibiting contract other than expressed in policy.—*George Washington Life Ins. Co. v. Norcross*, Ky., 198 S. W. 1156.

52.—Receivership.—Act April 24, 1905 (Laws 1905, p. 495) § 8, providing that the state auditor shall not consider a note held by an insurance company as an asset if it is six months or more past due, does not remove from the assets of a mutual company premium notes more than six months past due on which action is brought by the receiver of the insolvent company.—*Johnson v. House*, Ark., 198 S. W. 876.

53.—Waiver.—Where insurer in negotiations recognizes continuing validity of policy, after knowledge of conditions upon which claim of

forfeiture is based, or requires insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is, as a matter of law, waived.—Western Indemnity Co. v. Free and Accepted Masons of Texas, Tex., 198 S. W. 1092.

54. **Intoxicating Liquors—Criminal Liability.**—In prosecution for illicit distilling, if defendant allowed use of his land for still under agreement giving him control thereof or interest therein, he was equally responsible with party in control and operation.—Bullard v. United States, U. S. C. C. A., 245 Fed. 837.

55. **Libel and Slander—Libel per se.**—Statement that plaintiff, a married woman, had been making dates with other men and doing things that were awful, was not slanderous per se in absence of proof that it was used by defendant to convey idea that dates were made for immoral purpose or that statement was so understood.—Jackson v. Ferguson, Iowa, 165 N. W. 326.

56. **Mandamus—Appeal and Error.**—Where a statute gives right to appeal from refusal of county court to issue warrant for an officer's salary, and he has right to sue county, mandamus will not lie to compel payment. (Walker and Williams, JJ.)—State ex rel. Forgrave v. Hill, Mo., 198 S. W. 844.

57.—**Laches.**—Though Laches may be defense, board of revenue of county cannot defeat mandamus begun shortly after issuance of a certificate by probate judge, reciting applicant's erroneous payment of franchise taxes, for delay in applying for certificate, that being in discretion of probate judge.—Board of Revenue of Montgomery County v. Southern Bell Telephone & Telegraph Co., Ala., 76 So. 858.

58. **Master and Servant—Admissions.**—A statement of a physician on which an award is founded, though not sworn to, when made a part of the application for an award, and not controverted, has the same standing as an admission of fact made by the pleading in an ordinary action at law.—Massachusetts Bonding & Ins. Co. v. Industrial Accident Commission of California, Cal., 168 Pac. 1050.

59.—**Course of Business.**—Purchaser of grain on cars who, owing to shortage of cars, casually employed applicant to help load grain left by sellers on platform, was not liable to pay compensation; the work not being in the usual course of his business.—Carter v. Industrial Acc. Commission of California, Cal., 168 Pac. 1065.

60.—**Evidence.**—In an action for injuries from collision with an automobile, proof that the automobile belonged to defendant, and was being operated by defendant's regularly employed chauffeur, was *prima facie* showing that the chauffeur was acting within the scope of his employment.—Guthrie v. Holmes, Mo., 198 S. W. 854.

61.—**Imputed Knowledge.**—Switchman of 19 years' experience will be held to know that in switching, body of car moves from its position directly over track towards inside of curve over which its wheels are moving.—Morris v. Pryor, Mo., 198 S. W. 817.

62.—**Workmen's Compensation Act.**—In action under Workmen's Compensation Act, § 2, act of deceased in getting on wagon after it was unloaded and riding back for another load was natural act connected with his employment.—Horn v. Arnett, N. J., 102 Atl. 366.

63.—**Workmen's Compensation Act.**—Applicability of Workmen's Compensation Act (Code 1916, c. 15P), substituting compensation in lieu of father's common-law right for injury to minor child in service impairing his earning capacity, does not depend on parent's knowledge of employment or consent thereto.—Adkins v. Hope Engineering & Supply Co., W. Va., 94 S. E. 506.

64.—**Wrongful Discharge.**—When the vote to require bond from manager of grain elevator was recalled, his failure to give one was no ground for discharge.—Seelman v. Farmers' Cooperative Co. of Northwood, Iowa, 165 N. W. 811.

65.—**Wrongful Discharge.**—A servant suing for damages for wrongful discharge is under no

duty to account for profits from rentals, buying or selling or from investments or business enterprises generally, but only what was earned for personal services, rendered for others during the term, should be considered in reducing damages.—Redfield v. Boston Piano & Music Co., Iowa, 165 N. W. 365.

66. **Municipal Corporations—Building Regulations.**—Under charter provision authorizing city "to regulate the height, construction, and inspection" of new buildings, it could not prevent owner of lot in built-up section, between three and four story buildings, from erecting a one-story building, by refusal of a permit to erect it.—State v. Stahlman, W. Va., 94 S. E. 497.

67.—**Collision.**—In personal injury action by driver of automobile in colliding with a wagon obstructing a street after nightfall, it was error to exclude question of negligence on part of driver of wagon in failing to show light as required by city ordinance.—Roper v. Greenspon, Mo., 198 S. W. 1107.

68.—**Evidence.**—In action growing out of collision of automobile with motorcycle, testimony as to condition of the automobile brakes was material in determining the relative care under the circumstances, to be exercised by the driver.—Siegeler v. Neuweiler, N. J., 102 Atl. 349.

69.—**Nuisance.**—Rule that city is liable to persons lawfully using streets for injury resulting from nuisances which with notice it suffers to continue therein, though created by its independent contractor, is not applicable to case of injuries to residences from explosion of dynamite stored by a sewer contractor.—Holman v. Clark, Mo., 198 S. W. 868.

70.—**Nuisance.**—Code § 753, providing that cities shall keep highways, streets, avenues, alleys, public squares, and commons open and in repair and free from nuisance, includes parks.—Woodard v. City of Des Moines, Iowa, 165 N. W. 313.

71.—**Ordinance.**—If ordinance under which defendants were given franchise to operate jitneys was invalid this court is not precluded from so declaring at instance of complainants, having valid franchise for operation of street cars.—Memphis Street Ry. Co. v. Rapid Transit Co., Tenn., 198 S. W. 890.

72.—**Ordinance.**—El Paso charter, § 2, empowering city to protect health, life, and property, and to preserve order and security of city and inhabitants, gave power to prohibit loitering or walking back and forth in front of places of business for purpose of persuading persons from entering.—Ex parte Stout, Tex., 198 S. W. 967.

73.—**Proximate Cause.**—Collision of auto with rear of standing wagon, driving the wagon forward, is proximate cause of injury to occupant, pitched forward on motion of wagon being stopped by contact with horse.—Haynes v. Sosa, Tex., 198 S. W. 976.

74.—**Special Assessment.**—Where a special assessment to pay for a particular improvement has been held to be illegal the United States Constitution does not prevent the making of a new and just assessment to pay for the completed work.—Schneider Granite Co. v. Gast Realty & Investment Co., U. S. S. C., 38 S. Ct. 125.

75.—**Negligence—Railroad Crossing.**—Buggy driver's negligence in driving upon railroad crossing is not imputed to passenger without control over driver's actions.—Burton v. Pryor, Mo., 198 S. W. 1117.

76. **Nuisance—Injunction.**—Allegation of petition for injunction against erection of buildings for lumber yard as nuisance as to likelihood of diseases being brought into and kept in yard, asserted merely probability or uncertain contingency, and was insufficient to invoke injunctive relief.—Shamburger v. Scheurer, Tex., 198 S. W. 1069.

77. **Parent and Child—Custody.**—Where father is shown to be an improper person to have the custody and training of his infant child, he

will not be awarded its custody as against the maternal grandmother who is shown to be a fit person to rear and train the child.—*Ex parte Adams*, Okla., 168 Pac. 1004.

78.—**Necessaries.**—That husband has furnished wife with whom minor children are living sufficient money for necessities for herself and the children, held not to defeat his liability to person furnishing necessities for the children.—*Sanger Bros. v. Trammell*, Tex., 198 S. W. 1175.

79. **Payment—Duress.**—The presumption of want of duress in the making of contracts does not apply to the payment of money under threat of imprisonment where not claimed under a shadow of right, especially in view of Rem. Code 1915, § 2610, defining extortion, and the money can be recovered.—*Bertschlinger v. Campbell*, Wash., 168 Pac. 977.

80. **Physicians and Surgeons—Aggravation of Injury.**—Where defendants were negligent in treatment of plaintiff before she left hospital, and damages resulted therefrom, that plaintiff aggravated result by conduct after leaving hospital prematurely, would not bar recovery, but go in mitigation of damages.—*Schultz v. Tasche*, Wis., 165 N. W. 292.

81. **Pledges—General Title.**—Purchaser of land, who, with four others, signed declaration of trust, four paying no money and taking no part in affair except to indorse to purchaser four certificates of beneficial interest, title to land being conveyed to purchaser as trustee, had general title to certificates, though he pledged title to them as security for money borrowed.—*Cunningham v. Bright*, Mass., 117 N. E. 909.

82. **Principal and Agent—Scope of Authority.**—Where contract of sale provided that it might be settled "by cash or note," seller's agent, sent to settle, and who took notes in satisfaction of account, which seller accepted, did not act beyond scope of his authority.—*Ohio Cultivator Co. v. Dunkin*, Okla., 168 Pac. 1002.

83. **Railroads—Last Clear Chance.**—In action against railroad for injuries to pedestrian forced to jump from trestle, instruction, concededly correct in stating it was railroad company's duty to keep lookout, was not improper because adding "to ascertain that the track was clear."—*Gray v. Wabash Ry. Co.*, Mo., 198 S. W. 1137.

84.—**Mechanics' Lien.**—A bill seeking to enforce mechanics' liens on the unpaid balance due on the work from the owner to the contractor for railroad construction is not subject to the objection that it seeks to enforce a lien on the roadway of the railway, although praying for execution.—*Gulf, F. & A. Ry. Co. v. Sharpe*, Ala., 76 So. 856.

85.—**Right of Way.**—Where deed of right of way to railroad required grantor to provide fencing, required fencing was such as both parties would have been required to provide by statute except for contract, and cattle guards which road obligated itself to provide were such as statute put on it duty to provide.—*Louisville & N. R. Co. v. Durbin*, Ky., 198 S. W. 908.

86. **Replevin—Tender.**—Where plaintiff was entitled to retake motor cars on returning defendants' payments made, plaintiff's failure to tender same cannot be excused, unless defendants' conduct was such as to induce reasonable belief that it would be refused.—*Ford Motor Co. v. Farrington*, U. S. C. C. A., 245 Fed. 850.

87. **Robbery—Variance.**—Where money was taken out of possession of cashier by putting him in fear, and ownership was alleged in him, proof that money belonged to bank would not constitute fatal variance.—*Jenkins v. State*, Ark., 198 S. W. 877.

88. **Sales—Counterclaim.**—In action for price of logs delivered under contract, wherein defendants counterclaimed for failure to deliver quantity called for, instruction to find for defendants if plaintiff "failed to deliver any portion of said logs," was not erroneous as precluding recovery by defendants if plaintiff de-

livered any logs.—*Asher v. E. S. Howard & Son*, Ky., 198 S. W. 1149.

89.—**Duty of Acceptance.**—Under contract looking to sale of piano placed with buyer on 30-day trial, buyer was under duty to accept piano or return it to common carrier at end of 30 days, and, having made no effort to return, and not having responded to seller's letters, he accepted piano.—*F. O. Evans Piano Co. v. Tully*, Miss., 76 So. 833.

90.—**Express Warranty.**—Where vendor makes an express warranty, the purchaser is not bound to investigate truth of statements constituting the warranty.—*Raft River Land & Live Stock Co. v. Laird*, Idaho, 168 Pac. 1074.

91.—**Meeting of Minds.**—Seller's telegram, "offer thousand spuds," accepted by buyer in view of buyer's testimony as to his understanding of the offer, held sufficiently definite to show a meeting of the minds upon a sale of about 100,000 pounds.—*Gregory v. J. L. Price Brokerage Co.*, Mo., 198 S. W. 1128.

92. **Specific Performance—Equity.**—Where owner of land subdivided it into lots, and represented to purchaser his intention to improve certain streets, equity will not require specific performance, when promise was made in good faith and much of proposed work was actually performed.—*Martin v. South Bluefield Land Co.*, W. Va., 94 S. E. 493.

93. **Telegraphs and Telephones—Delay in Transmission.**—In an action for damages for delay in transmitting a death message, the admission of evidence that plaintiff, McGaughey, was sometimes called "McGoy," the addressee in the telegram, without showing defendant's knowledge thereof, held not error; evidence showing message could have been delivered regardless of spelling.—*Western Union Telegraph Co. v. McGaughey*, Tex., 198 S. W. 1084.

94.—**Rates.**—Inasmuch as Interstate Commerce Law, as amended by Act of June 18, 1910, § 7, requires that telegraphic rates be uniform, it would seem that such companies cannot waive condition in Interstate telegram that claims for damages be filed in 60 days.—*Kerns v. Western Union Telegraph Co.*, Mo., 198 S. W. 1132.

95. **Trade Unions—Right to Form.**—Workingmen have a right to form unions and to enlarge their membership by inviting other workingmen to join, but this right, like all other rights, must be exercised with reasonable regard for the conflicting rights of others.—*Hitchman Coal & Coke Co. v. Mitchell*, U. S. S. C., 38 S. Ct. 65.

96. **Vendor and Purchaser—Rescission.**—Where vendor's promise to improve land was made with a secret and fraudulent purpose to deceive purchaser, who, in reliance thereon accepted a conveyance, equity will rescind.—*Martin v. South Bluefield Land Co.*, W. Va., 94 S. E. 493.

97.—**Reservation in Deed.**—Under agreement to convey land free of incumbrances when seller's title was subject to reservation excepting a lot for the purpose of building a schoolhouse, the exception was an incumbrance, and purchaser was justified in refusing to accept a deed.—*Reutler v. Ramsin*, N. J., 102 Atl. 351.

98. **War—Espionage.**—Circulation of pamphlets inveighing against drafting, exaggerating horrors of war, and making false statements as to motives of Congress, etc., held violation of so-called Espionage Act June 15, 1917, § 3.—*United States v. Pierce*, U. S. D. C., 245 Fed. 878.

99. **Waters and Watercourses—Diversions.**—It is within legislative power to restore rule of common law and render person diverting water from its natural channel liable for any damages resulting from its escape.—*Burt v. Farmers' Co-op. Irr. Co.*, Idaho, 168 Pac. 1078.

100. **Wills—Guardian.**—The guardian of an infant legatee cannot maintain suit against devisee in possession to restrain waste, and for accounting and discovery; his proper remedy being an application for appointment of an administrator of the will by the probate court.—*Lowell v. Wheeler*, Vt., 102 Atl. 337.

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PROOF OF VENUE IN A CRIMINAL CAUSE NOT TO BE BEYOND REASONABLE DOUBT WHERE ONLY LOCAL JURIS- DICTION IS INVOLVED.

The Supreme Court of Louisiana, while approving what it says is the minority ruling by American Courts, that venue must be proved in a criminal case by evidence beyond a reasonable doubt, yet says that this principle is subject to an exception, where the question arises out of claim, that the vicinage of an alleged offense is not where an alleged offender is being tried but elsewhere in the state. In the latter event a preponderance in proof only is required. *State v. Jackson*, 77 So. 196.

The Court, in a majority opinion said: "It is no doubt true, we think, that where venue is an essential element of a crime, it must be proved beyond a reasonable doubt, but where it is proved beyond a reasonable doubt or conceded that an act denounced by the law of a particular state as a crime has been committed within the territorial limits where that law prevails, the question whether it was committed within the limits of one political subdivision of the state or another concerns as we have said, not the guilt or innocence of the person accused, but merely the question of the place and the court in which he shall be prosecuted; and that being the case, we are of the opinion that such fact may be established by a preponderance of the evidence to the satisfaction of the jury."

While we are rather of the opinion that what is said to be the "majority rule," that venue, whether that be an essential element in crime or not, need only be shown by a preponderance of evidence, yet think there is such a distinction as the Louisiana court points out. Subdivisions in a state are for its own policy, and the fact that changes of

venue may be taken by the prosecution or by defendant because of local or other reasons, proves that this policy is not inflexible.

This thought seems to enforce the view, that venue at one place or another in the territory covered by a general law is not intensely jurisdictional. It is more accidental. It is established more as representing convenience than necessity, though it be stated to be exclusive when established.

A dissenting judge goes upon the theory, that our common law and constitutional guarantees make of venue an essential qualification in a charge of crime. But so far as regards our common law, even if we concede that in general language it shows opposition to the view of the majority of the court, yet the question of venue ought to be raised, in a court of a state denouncing a crime committed in its borders, by special plea and have that determined by a jury as a preliminary fact. If a defendant fails so to plead, he ought not to have the right to gain an advantage in having the question treated as an essential ingredient of crime charged as crime.

As to constitutional guarantees, the same observation may be made, especially as these guarantees recognize the creation of vicinage by domestic statutory regulations and lawful subdivisions within states. Though as to such subdivisions a defendant may be vested with constitutional rights, yet they are not of the kind he is powerless to waive. We greatly doubt whether if the real venue were in one state and prosecution were in another his consent would vest the court of another state with jurisdiction over the subject matter.

A concurring judge holds that the plea to the jurisdiction was correctly decided by the judge because it involved no question of guilt or innocence and therefore was properly triable by a judge. This may be correct, but, if there is a dispute or a con-

flict as to the county in which the alleged offense was committed, and therefore, judicial cognizance was unable to say whether a particular court had jurisdiction to try it, this would seem to present a jury question. But after all as to how such a plea should be disposed of concerns more the practice in a particular state than a question of general law. The concurring judge was right, however, in saying that the question was not one of guilt or innocence.

We have not found any case where this particular question heretofore has arisen, but we do not doubt that a statutory rule for disposing of a question of this kind would not offend constitutional guarantees of the right of trial by jury in the vicinage of an alleged offense.

NOTES OF IMPORTANT DECISIONS.

INTERSTATE CARRIER — REPARATION CLAIM NOT AFFECTED BY SHIPPER BEING OBLIGATED TO CUSTOMERS.—In 85 Cent. L. J. 242, there was noticed a ruling, by Ninth Circuit Court of Appeals, to the effect that a shipper cannot be deprived of the reparation provided by law by the carrier showing in his business that excess freight paid by him was passed along to his customers in his selling price. N. Y., N. H. & H. R. Co. v. Ballou & Wright, 242 Fed. 862.

By U. S. Supreme Court in So. Pac. Co. v. Darnell-Faenzer Lumber Co., 38 Sup. Ct. —, the principle thus above stated is approved, the reasons therefor being stated by Justice Holmes as follows:

"The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss. The plaintiffs suffered losses to the amount of the verdict when they paid. Their claim accrued at once in the theory of the law and it does not inquire into later events. Olds v. Mapes-Reeve Construction Co., 177 Mass. 41, 44. Perhaps, strictly, the securing of such an indemnity as the present might be regarded as not differing in principle from the recovery of insurance, as *res inter alios*, with which the defendants were not concerned. If it be said that the whole transaction is one from a bus-

iness point of view, it is enough to reply that the unity in this case is not sufficient to entitle the purchaser to recover, any more than the ultimate consumer who in turn paid an increased price. He has no privity with the carrier: State v. Central Vermont Ry. Co., 81 Vt. 459. See Nicola, Stone & Myers Co. v. Louisville & Nashville R. R. Co., 14 I. C. C. 199, 207-209; Baker Manufacturing Co. v. Chicago, Northwestern Ry. Co., 21 I. C. C., 605. The carrier ought not to be allowed to retain his illegal profit, and the only one who can take it from him is the one that alone was in relation with him, and from whom the carrier took the sum: New York, New Haven & Hartford R. R. Co. v. Ballou & Wright, 242 Fed. Repr. 862. Behind the technical mode of statement is the consideration well emphasized by the Interstate Commerce Commission, of the endlessness and futility of the effort to follow every transaction to its ultimate result: 13 I. C. C. 680. Probably in the end the public pays the damages in most cases of compensated torts."

In further reasoning the justice distinguishes between cases where recovery for discrimination is by those paying reasonable rates and complain because of lower rates being given to others. As to such cases the justice says: "The damage depends upon remoter considerations. But here the plaintiffs have paid cash out of pocket that should have been required of them."

This is not a very illuminating statement in view of the fact that the carrier was contending that no damage was suffered at all by the shipper. The matter was better stated by Ninth Circuit Court of Appeals, which said that in a reparation case the court would not be diverted into a wholly collateral issue, which in fact was between shipper and his customers.

COMMERCE—ADVERTISEMENTS IN NEWSPAPERS PRINTED IN FOREIGN STATE VIOLATING LOCAL POLICY.—It has been held by U. S. Supreme Court that a state statute preventing personal solicitation by an agent of a non-resident dealer in intoxicating liquors is valid. Delamater v. South Dakota, 205 U. S. 93. And Alabama Supreme Court has held that under said ruling a state statute forbidding the sale within the state of newspapers containing liquor advertisements applied as well to newspapers printed elsewhere as in the state, State ex rel. Black v. Delaye, 193 Ala. 500, L. R. A. 1915 E. 640.

In Post Printing & Publishing Co., v. Brewster, 246 Fed. 321, decided by District Court of Kansas, it is held that a Kansas statute forbidding the sale and advertisement of cigarettes did not apply to a newspaper printed in Missouri and sold in Kansas.

It must be conceded that newspapers and the information they contain are interstate commerce, but this necessity may or may not mean that, because they may advertise in Missouri the sale of cigarettes where they lawfully may be sold, they may do the same thing in Kansas. The Delamater case held that a traveling agent could not solicit sales of liquor in prohibition territory in South Dakota, and the Delaye case said advertising was but a form of solicitation for sale. The Brewster opinion says that these cases are distinguishable from it which concerns cigarettes because of the Wilson act.

We do not, however, perceive this distinction. Domestic policy can prevent further disposition of property admissible into a state. When it has gone into the mass of property in a state, it becomes subject to local police power. A peddler cannot carry on his business merely because he is peddling articles shipped to him in interstate commerce, without paying a license required to peddle. May not a state, when a foreign newspaper containing an advertisement for things to be sold in a state in violation of its laws, forbid the sale of the newspaper? If it can restrain a peddler from selling cigarettes, may it not prevent soliciting advertisements intending to effect a sale?

In *Browning v. Waycross*, 233 U. S. 16 it was held not interstate business to send an agent to put up lightning rods shipped in interstate commerce. Is it interstate business to forbid the distribution of an article sent into a state forbidden thus to be disposed of? The commerce clause it may be said secures the right to purchase and sale and necessarily delivery to purchaser. But the latter has no more right to dispose of what is delivered, than if an article formerly was not in interstate commerce at all.

BENEFICIAL ASSOCIATION — RETRO-SPECTIVE OPERATION OF BY-LAWS.—In *Fitzgibbon v. Bowen*, 165 N. W. 1059, the Supreme Court of Minnesota interprets a by-law for affording relief to members suffering permanent injury incapacitating them for work as extending to an injury so resulting in the past even prior to the existence of the by-law.

The by-law in this case says: "Any member having a continuous membership of ten years who, by reason of permanent injury, not contributed to or brought about by his own improper conduct, is totally incapacitated for work may receive the sum of \$5.00 per week."

The facts show that plaintiff joined a beneficiary association in 1903, and suffered an injury in 1905 that incapacitated him for work. At that time there was no pension plan for members of the association, but one was adopted in 1914, in which plan the above by-law was embraced. There was a levy of 25 cents per month on all the membership of the association to maintain a fund for the plan.

The court, after premising with the statement of rule that there should be liberal construction of such a by-law, said that this by-law "must be construed to provide for all of its members, who were then or might thereafter become totally incapacitated for work. It speaks in the present tense. To say that an assessment was placed upon all members, those incapable of performing work as well as those capable, and deny those incapacitated from the benefits thereof, would, in our opinion, do violence to the purpose and intent for which the order was organized."

The court's assumption that the order was organized to establish a pension fund is contradicted by the facts. It had existed for years without having provided for such a fund. When it provided therefor it would be thought to be acting only prospectively and not also retrospectively.

But this construction also violates an inherent principle in such an organization, namely, the principle of equality of burden and equality of benefit. To allow one member to be paid for a past injury and to confine others to prospective injuries puts members on an inequality.

Take the case in hand and the construction adopted compels the association to pay \$5.00 a week arising as a certainty in consideration of dues of 25 cents a month. Why this gratuity, when the member though suffering from a permanent injury may have had hopes of recovery therefrom?

If he had, then, as to future permanent injury he is placed on an exact equality with members generally. All of this ignores the general rule of construction applicable to statutes, ordinances and rules operating prospectively, unless it is evident they also operate retrospectively. See *Lynch v. Turrill*, 236 Fed. 653, 149 C. C. A. 649; *Jacobs v. Colgate*, 217 N. Y. 235, 117 N. E. 837. It is said this occurs more often with remedial and curative statutes than with others. *Waddill v. Masten*, N. C. 90 S. E. 694. But of all contracts aiming solely at future contingencies an insurance contract is by its very nature such a one.

WAR LEGISLATION.*

The beginning of the New Year finds the greatest nations still in deadly war. Our own republic, after more than two and one-half years of hesitation was irresistibly drawn into the conflict. Perhaps it is yet too soon to anticipate the verdict of history as to the final causes, but it seems apparent that the predominant reasons for the catastrophe are to be traced to the opposition of two ideals. On the one hand, the unmoral Prussianized leaders of modern German thought rejected with scorn the theory of a democratic government, while on the other, all who consciously, or unconsciously, are striving to maintain the essential dignity of the individual man, are arrayed either actively or in sympathy in support of democracy. It has been well said that "there have been earlier crises out of which human fate proceeded in new directions; but the contestants in those conflicts understood only obscurely, if at all, the ultimate stakes for which they were fighting. We can plead no such ignorance. We know the issue and whither it leads."¹ If the mighty power which now threatens to engulf the ancient land of Europe and stretch its military and commercial empire from Berlin to Bagdad should succeed, it would reverse the progress made during two thousand years of effort towards the attainment of the Christian philosophy of government and abase the whole world before the War Gods of Northern Paganism. The cruel selfishness of Thor and Woden would supplant the religion taught by the Divine Redeemer of mankind, a religion which however imperfectly it has been practiced by the masses of men, has been the only real cause of

*This article is a revision of an address delivered by Hon. Walter George Smith, President of the American Bar Association, on January 2, 1918, to the Vermont Bar Association. We are glad to publish this very timely article by Mr. Smith, who has graciously consented to act as one of our associate editors, and whose articles and editorials in recent issues have been read with great interest by our subscribers.

(1) William Roscoe Thayer.

those blessings which make civilized life as we know it at its best.

For forty years, under the guidance of their statesmen, their philosophers, their historians and their poets, the German people have learned a lesson of cruelty and hardness, while with a persistency and thoroughness unprecedented in history they have perfected the devilish enginery of destruction. Their armies of spies have sought out the hidden secrets of all nations and peoples. No art of treachery has been left untried as the complement of brutal force. From the great body of perverted intellect which has aided their propaganda, that of Nietzsche stands out as perhaps the most effective. Thus he formulates their answer to the religion first preached by the Crucified:

"Ye shall love peace as a means to new wars and the short' peace more than the long.

"Ye say it is the good cause which halloweth even war! I say unto you that it is the good war which halloweth every cause. War and courage have done more great things than charity. * * * Be not considerate of thy neighbor. * * * What thou doest can no one do to thee again. Lo, there is no requital.

"Thou shalt not rob! Thou shalt not slay! Such precepts were once called holy. * * * Is there not even in all life robbing and slaying? And for such precepts to be called holy, was not truth itself thereby slain? * * * This new table, oh, my brethren, put I up over you: Become hard."²

Whole volumes have been made up of such diabolism; and the genesis and conduct of the present war have shown too well that the German people have been apt scholars. Where the tread of their columns has fallen they have left only marks of devastation. St. Jerome has been quoted as saying: "When the barbarian ancestors of these modern savages fell upon the Roman Empire, they left naught but earth

(2) "Thus spoke Zarathustra." Translated by Thomas Common, pages 52, 242, 243, 246 and 262. "Out of their mouths," pages 33 and 34.

and the sky." Upon the sullen retreat of the Kaiser's armies from France, the earth itself was destroyed.

We need not dwell upon the atrocious incidents which have outraged every better human instinct, whether by the torture and murder of men, women and children, in bombardment of hospitals and undefended dwellings and school houses, or the destruction of the noblest monuments of antiquity. It is patent that the civilized world has girded itself for a mighty struggle for the preservation of all that makes life worth living. Failure means the contemptuous overthrow of a democracy and the enthronement of outworn tyranny. All that has been gained for mankind by four centuries of growth of the principles of self-government on the American continent is at risk, for it is fatuous to believe that a triumphant Prussian junkerdom would permit the continuance of the living protest against its iniquity embodied in our democratic republic. Though we are confident we should win in the end, it would be at heavy cost.

In this crisis of the world's affairs our national government is bending all of its powers to concentrate and mobilize our resources for effective action. Our soldiers are in France, our destroyers are coping with submarines, our young men are being drafted into the military and naval service and are training in camp. Food and fuel, the great staples of foreign and domestic commerce, the transportation systems by land and water are taken under government regulation. Direct and indirect taxes in many forms are levied, capital is invested in government loans and financial stability is tested by withdrawing from active business and from investments sums, the magnitude of which staggers the imagination. These are the obvious physical means for coping with the unprecedented peril; but there are other considerations and other means of even greater importance. In the language of one who is an active partici-

pant, "This war has turned out to be not merely a military war. Its final decision will depend much more upon political, economical and psychological than upon merely military factors.³

The outbreak of the war came with such suddenness as to find this nation unprepared in every way. We were so engrossed in our own domestic matters that we had followed with but little real interest the political and military plans of the Central Powers of Europe, though it required no spirit of prophecy during the past generation to foretell their outcome. Even after the invasion of Belgium and the tragedy of the Lusitania there were large bodies of our people who still believed it possible to maintain our neutrality. Although our foreign population with a large part of those born of foreign stock and speaking and reading foreign languages and maintaining as far as possible a foreign attitude of mind, formed nuclei for disloyal plots, it was with surprise we witnessed the outcome in a wholesale destruction of life and property in pursuance of plans traced to the embassies of Germany and Austria while we were still at peace. It may be doubted whether even now there is a thorough realization of the danger to our dearest ideals and interests from any relaxation of effort by any part of the community.

The national administration has made a special appeal to the lawyers of all the states to aid its efforts in making effective the conscription laws so that no injustice be done to any individual. The American Bar Association has responded by putting its vice-presidents, local councils and its entire membership in the various states at the disposal of their governors. It is not probable that these duties will impose onerous obligations on more than small groups, but there is a more general and more important duty that the American lawyers may and should perform each in his separate sphere and in the various organizations which give

(3) *The Coming Victory*, Gen. Smuts.

voice to professional opinion. It lies in making known the underlying rights and obligations of the citizens of the United States in war time, and especially in removing the false notions widely spread by malicious or ignorant men that the war measures of the government are without constitutional warrant and are therefore tyrannical and legally void. The nearest precedents for existing conditions are to be found in the events of the war for the Union from 1861 to 1865. They show a close analogy between the questions of constitutional power of the legislative and executive departments of the government in that crucial period, and in this.

The late Chief Justice Agnew, of Pennsylvania, in an address delivered at Harrisburg in March, 1863, when civil war was flagrant, treats with his accustomed clearness the constitutional limitations of the power of Congress and of the President in peace and in war. Although his attention was especially directed to the power to suppress insurrection, his observations are apposite for existing conditions.

"Some of its (the Congress') powers relate to a state of peace," he says. "Others to a period of war; and the fact first striking the attention of a jurist is that no correct exposition can be made of the latter in a frame of mind that looks alone to a state of peace, before the clangor of arms has aroused its dormant energies. It must not be overlooked that as war class rises, the peace class necessarily falls; not because they become extinct, but because the inherent vigor of the Constitution itself brings the war powers into play to meet the exigency and relaxes the latter to admit the free use and full scope of the former." After referring to the specific powers granted in Art. 1, § XIII, with a special reference to the clauses relating to the military power, XI to XVI, he quotes Clause XVIII, Art. I, of the Constitution, authorizing Congress "to make all laws which shall be necessary and proper for carrying into exe-

cution the foregoing powers and all powers vested by this Constitution, in the government of the United States or in any department or officer thereof." Whenever this clause has come before the court for interpretation, the great decision of Chief Justice Marshall in *McCullough v. Maryland*⁴ has been the beacon. Although rendered in exposition of a peace power, it is not the less applicable to one relating to war. "We admit," he says in words often quoted, "as all must admit, that the powers of the government are limited and that its limits cannot be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers that it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution and all means appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the spirit and the letter of the Constitution, are constitutional."

A recent commentator has summed up the trend of the decisions of the Supreme Court since the Civil War, which have left beyond the range of controversy what was too often disputed before that war, that the sovereignty of the national government is the fundamental premise, from whatever angle we may approach the subject, whether it be administrative efficiency or the exercise of any other constitutional power. "In short," says this writer, "it may be stated as an established principle of our constitutional law that the supreme purpose of our constitution is the establishment and maintenance of a state which shall be nationally and internationally a sovereign body and therefore that all limitations of the Constitution expressed and implied, whether relating to the reserved rights of the state or to the liberty of the individual, are to be

(4) 4th Wheaton, 312.

construed as subservient to this one great fact.⁵

Therefore, just as President Lincoln was clothed with power and enjoined by his oath of office, as Judge Agnew pointed out, more than one-half century ago, to use the whole military power of the government to suppress domestic insurrection and to see that the laws be executed, so in these days by virtue of his authority as Commander-in-Chief of the Army in pursuance of congressional legislation, President Wilson in the exigency of foreign war is called upon to act in a similar way. The use of this great power rests upon the discretion of the President to an almost unlimited extent. "Congress," says Judge Agnew, "could not foresee all the movements and resorts of the enemy and those adhering to him; nor the embarrassment attending the measure to subdue him. A war of force from its nature knows no rule of action nor where the force must be used to meet the exigency." He then shows the difference between the state of constitutional rights in time of peace and of war. In time of peace none can be taken away except by due process of law, but in time of war even the rights of life, liberty and property must sometimes yield to inexorable military necessity. The citizen may be drafted into the military service, his property may be taken for public use. While it is sometimes said that this necessity overrides the Constitution, the learned judge shows that the Constitution, in the clauses we have referred to, itself recognizes the necessity of force and Congress acts within constitutional limits in placing the forces of the nation in the power of the President.

"The injunction of the Constitution and the Acts of Congress in pursuance are a grant of express, unlimited, unconditional authority to use the whole physical force of the nation according to his own judgment in quelling traitors, their aiders and abettors, and compelling them to submit to the

law; and * * * this express grant without limitation for a purpose involving the very life of the nation and the defense and preservation of the Constitution on every principle of law, logic and necessity requires the exercise of all incidental powers necessary to the execution of the main purpose of suppressing the insurrection." He continues:

"The rights of the loyal also yield to the necessities of war. The law abiding citizen must shoulder his musket and lay down his life on the battlefield; his liberty is restrained by discipline; his property taken and destroyed for a military purpose."

And again, "If then the stern necessity of war demands the sacrifice of fundamental God given rights, what exemption from the same necessity can be claimed for the minor guarantees of the Constitution? On what higher foundation rests the freedom of speech and of the press? They are but the outposts set to guard the higher rights of life, liberty and property."

This vigorous exposition of the executive power, if taken without consideration in the light of Supreme Court decisions subsequently made, which it cannot be doubted would have met the approval of the distinguished jurist, might lead to the conclusion that by Act of Congress the President can be legally vested with the powers of a dictator and the safeguards imposed by the English law since Magna Charta be swept away whenever in the judgment of Congress the exigency of the public safety requires the sacrifice. The consequences of such an interpretation of the Constitution would be too far-reaching for adequate description. At the first onset of war, defenses against arbitrary power, won by centuries of struggle, would fall like a house of cards. There were those who feared this danger in the dark days of the Rebellion, when loyal states were honeycombed with treason and insidious attacks upon the government within the lines were feared even more than the gallant foe who openly sought to disrupt the Union.

(5) Willoughby on the Constitution, Sec. 36.

In 1866 there came before the Supreme Court of the United States the famous case of *Ex parte Milligan*.⁶ The petitioner in the court below, a citizen of Indiana, had been tried before a military commission for treasonable practices and had been sentenced to death by order of the commander of the department. The judges being divided in opinion as to the legality of this summary proceeding under martial law, while the civil courts were open, and there were no military operations carried on within the borders of the state, certified the question for decision to the Supreme Court. The proceedings had for their warrant the President's proclamation of September 24, 1862, ordering:

"That during existing insurrection and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia draft, or guilty of disloyal practices affording aid and comfort to rebels against the authority of the United States shall be subject to martial law and liable for trial and punishment by court-martial or military commissions.

"That the rights of habeas corpus is suspended in respect to all persons arrested or who now or hereafter during the Rebellion shall be imprisoned in any fort, camp, arsenal, military prison, or other place of confinement by any military authority or by sentence of a court-martial or military commission."

Obviously no cause involving graver consequences could be presented for decision. Counsel drawn from the leaders of the profession appeared on either side. For the petitioner, Jos. E. McDonald, Jeremiah S. Black, James A. Garfield and David Dudley Field; for the government, Attorney-General Speed, Henry Stanbery and Benjamin F. Butler. Their arguments exhausted the history of precedents, the philosophy of government in its relation to criminal trials and the long upward struggle for the individual rights of English

speaking men. Counsel for the government sought to minimize the safeguards of the Fourth, Fifth and Sixth Amendments of the Constitution, relating to unreasonable searches, due process of law and civil rights in trials for crime, in much the same language as that already quoted from Judge Agnew's address:

"These in truth," said Benjamin F. Butler, "are all peace provisions of the Constitution and like all other constitutional and legislative laws and enactments are silent amidst arms when the safety of the people becomes the supreme law." The trenchant words of Jeremiah S. Black, however, found response in the minds of American lawyers everywhere, as they did in those of the justices before whom they were uttered. "I think," said he, "it is precisely in a time of war and civil commotion that we should double the guards upon the Constitution. In peaceable and quiet times our legal rights are in little danger of being overborne; but when the wave of power lashes itself into violence and rage and goes surging up against the barriers which were made to confine it, we need the whole strength of an unbroken Constitution to save us from destruction." The opinion of the court was delivered by Mr. Justice Davis. It was unanimous upon the main question involved, deciding that the military commission was without power to try the petitioner. The theory that necessity can abrogate any of the provisions of the Constitution was swept aside in emphatic terms. "The Constitution of the United States," said the court, "is a law for ruler and people equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism; but the theory of necessity on which it is based is false; for the govern-

ment within the Constitution has all the powers granted to it which are necessary to preserve its existence; as has been aptly proved by the result of the great effort to throw off its just authority. * * *

"The laws and usages of war * * * can never be applied to citizens in states which have upheld the authority of the government, where the courts are open and their process unobstructed." The Chief Justice and Justices Wayne, Swayne and Miller, while concurring with the majority of the court, made two reservations: "(1) When the right of habeas corpus is suspended, the executive is authorized to arrest as well as to detain the suspected person: (2) There are cases in which the privilege of the right being suspended, trial and punishment by military commission in states where civil courts are open may be authorized by Congress as well as arrest and detention."

Willoughby, commenting upon the opinion of the court in *Ex parte Milligan*, thinks it is too absolute for it to say, as it did, that "martial law cannot arise from a threatened invasion, the necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." He thinks it is correct to say that the necessity must be actual and present, but not that the necessity cannot be present when the courts are closed, for, as the minority judges correctly point out, there may be urgent necessity for martial rule even when the courts are open." He concludes, "That the better doctrine is to test the necessity for an act under martial law by its special circumstances."⁷

Ex-Justice Charles E. Hughes, in his recent admirable address upon War Powers Under the Constitution, before the American Bar Association at Saratoga, after making the same quotation, expresses the opinion that "certainly the test should not be a mere physical one, nor should substance be sacrificed to form." One of

the most learned commentators on the Constitution, the late Judge J. I. Clark Hare, felt that undue bounds had been given to the military power by the court after the Civil War, notwithstanding the decisions of *Mitchell v. Harmony*,⁸ and *Ex parte Milligan*, by the decisions in the cases of *Mitchell v. Clark*⁹ and *Coleman v. Tennessee*.¹⁰

He says, "Despite the judgment in *Ex parte Milligan*, the Supreme Court * * * recently countenanced the Act of March 3, 1863, which virtually established martial law by arming the President and officers under his command with the dictatorial power to deprive any man, whom they regard as inimical, of liberty and property. Agreeably to the fourth section, "Any order of the President or under his authority made at any time during the existence of the present rebellion, shall be a defense in all courts to any action or prosecution, civil or criminal * * * for any search, seizure, arrest or imprisonment * * * under and by virtue of such law or under color of any law of Congress." This statute, he thought "operated as a declaration of martial law throughout the length and breadth of the United States. * * * It is directly in the teeth of the principles laid down in *Ex parte Milligan* and may hereafter serve as a foundation on which to rest government by the sword."¹¹ The decision in *Mitchell v. Clark* is indeed hard to reconcile with *Ex parte Milligan*. The military commander at St. Louis had expropriated for the military chest the rent of certain storehouses in the city of St. Louis. His order was deemed a sufficient defense to an action to recover these rents, in view of a statute passed by Congress imposing a statute of limitations fixed at two years. The court had had before it a similar question in *Bean v. Beckwith*,¹² where it was held

(8) 13 How. 113.

(9) 110 U. S. 633.

(10) 97 U. S. 514.

(11) 2 Hare Const. Law, 983.

(12) 13 Wall. 510.

(7) Wil. on Const., Sec. 734.

that the defense applied solely to acts done under authority given specifically by the President, but in the case of *Mitchell v. Clark* the act was done without such direct authority by order of the general in command. As was said by the Supreme Court in that case, "possibly in a few cases acts might have been performed in haste and in the presence of overpowering emergency for which there was no constitutional power anywhere to make good." Stating further, that there can be no doubt of the power of the Congress to pass an act of indemnity.

Obviously in a time of war or insurrection, acts which in time of peace would be a violation of private right, must be tested by the touchstone of necessity, as was fully laid down by Chief Justice Taney in *Mitchell v. Harmony*. Firm ground was established by the case of *Ex parte Milligan*, however, and it cannot be doubted that its doctrine, with the necessary consideration of varying conditions of war or peace, is authoritative.

It establishes that the Constitution in all of its parts is the ever living guide for the conduct of all branches of the government and no part either in peace or in war ceases to extend its beneficent protection. Therefore we may look with satisfaction upon the extraordinary and energetic response made by the Congress of the United States in its last extra session to the duties laid upon it by German aggression, feeling that the drastic measures taken for the protection of the country are all within constitutional limitations.

On April 6, 1917, war was declared in the following joint resolution:

"Whereas, the Imperial German Government has committed repeated acts of war against the people of the United States,

"Resolved by the Senate and the House of Representatives, that a state of war between the United States and the Imperial German Government which has thus been thrust upon the United States, is hereby formally declared; and that the President

be and he is hereby authorized and directed to employ the entire naval and military force of the United States and the resources of the government to carry on war against the Imperial Government of Germany, and, to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States."

How well this solemn pledge has been carried out is being brought home to every American citizen of the land. A summary of the legislation enacted since the memorable declaration of war, whatever may be the mistakes in detail and inequalities which experience may develop and which will doubtless be corrected, shows that it redounds to the credit of our national legislature, both for its patriotism and its industry.

By the Act of June 15, 1917, the war powers are strengthened by the addition to the criminal code of provisions governing acts of espionage, giving information to the enemy, conspiring to injure property in foreign jurisdictions, unlawful use of the mails, and interference with commerce by violence. By the same act the President is authorized in his discretion to lay an embargo on foreign commerce. By other acts the military and naval forces are increased and strengthened and their equipment provided for. The detention of our own vessels, internment camps and cognate subjects are regulated, including the seizure of foreign vessels and their use in the service of the United States. A bureau of war risk insurance for vessels is created and the seizure of enemies' property directed. By the Act of August 10, 1917, to encourage production, conserve the supply and control the disposition of food products and fuel, the President is given power to fix prices of necessities, forbid hoarding, take over factories, pipe lines, packing houses, mines or plants, requisition food and supplies for army and navy, purchase, store and sell

food, prescribe regulations for or wholly prohibit exchanges or boards of trade from carrying on operations, fix the price of wheat, forbid the distillation of spirits, regulate the manufacture and importation of malt or vinous liquors, fix the price of coal, regulate the sale or take over the plant, with all the necessary powers incident to the exercise of his discretion in these various directions, fixing heavy penalties upon those who seek to resist or avoid his orders.

With such powers legally in the hands of the Executive, our democratic form of government shows itself compact and effective. Our resources in men and material are at the command of the President as completely as though we were an autocratic instead of a democratic nation, but with this vast difference: In an autocratic government such powers are inherent in the ruler, with us they will be ended by the same power which granted them. Meantime, the courts are always open and the humblest citizen is within their protection. Therefore it is, that notwithstanding the inquisitorial power of the government, whether it be exercised in relation to taxation or the regulation of business or of the professions, a power which has only begun to make itself felt in daily life, the patriotic devotion of the masses of our people rises higher day by day, as they realize the crisis in the world's history and the direful consequences of a failure to make good the pledges of our Congress. We are strongly resolved to yield everything demanded, to save democracy. The prescient wisdom of the founders of our Constitutional system receives confirmation in every test and we may confidently believe we shall emerge from the present conflict with every safeguard of individual liberty unimpaired.

WALTER GEORGE SMITH.

Philadelphia, Pa.

MASTER AND SERVANT—ACT OF GOD.

MATTHEWS v. CAROLINA & N. W. RY. CO.

Supreme Court of North Carolina. Dec. 23, 1917.

94 S. E. 714.

A railroad owes no duty to send an engine to remove the goods in a shanty car in which a servant has been allowed to live and which is endangered by a rising flood.

BROWN, J. The evidence tends to prove that plaintiff was employed by defendant as an assistant coal heaver at its coal chute at Cliffs, a station on Catawba River. By permission of defendant, plaintiff and his family occupied as a residence two unused shanty cars located on a side track near the chute. They lived in the cars with their household effects from May 1 to July 16, 1915. On that night an unprecedented flood swept over the banks of the Catawba, submerged the shanty cars, and destroyed plaintiff's property therein.

The evidence shows that during the day of the 16th, before the water reached the track on which the shanties were located, a freight train in charge of Conductor Winkler passed Cliffs going towards Hickory. Nothing was said to Winkler by the plaintiff, Matthews, or by Askew, his foreman, about moving the cars. After the freight train passed in the afternoon, Askew, plaintiff's brother-in-law, phoned the defendant's shops at Hickory and requested that an engine be sent out to move the shanty cars. At that time the water had not reached the shanties. He was told that there was only one engine there and that had to be held on account of a washout on the line at another point. It had required Winkler from 2:30 until 6 o'clock that same afternoon to get his train from Cliffs to Hickory, a distance of two or three miles.

The court overruled a motion to non-suit which is assigned as error. The exception is well taken. We know of no principle of law that imposed upon the defendant the legal duty to protect and rescue plaintiff's chattels from the destructive consequences of an act of God. The plaintiff was occupying the shanty cars as a residence by permission of defendant. His relation to defendant was that of a servant who has brought his effects upon the master's premises by his permission, the servant retaining personal control of his property. The law imposes no duty upon the master to rescue his servant's goods from the consequences of a destructive agency for which the master was in no way responsible. The cause of the destruc-

tion was the act of God, and not that of the master. 1 Labatt, 15. The rule is thus stated by the Georgia court in *Allen v. Hixson*, 111 Ga. 460, 36 S. E. 810:

"When an employe, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employe's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability." 24 Cyc. 1072, and notes, and note to 42 L. R. A. (N. S.) 363.

To illustrate: Suppose plaintiff had been a farmer's tenant residing in a tenant house on the banks of the Catawba, and when the flood began to rise he had telephoned his landlord to bring his team and remove his household goods, and the landlord had failed to do so. Would the landlord be liable? Certainly not. The law imposes no such duty on him, although humanity did. Causes of action arise only for violations of duties imposed by municipal law. Unfortunately for plaintiff, he failed to have his cars attached to Winkler's freight train as he could have done, and when he phoned to Hickory for help, the defendant's only engine there was necessarily detained to meet another pressing demand. Had this not been so, we doubt not that it would have been sent to plaintiff's relief.

The position that defendant may be held as a bailee of the household goods is untenable. Possession and control are essential elements in the law of bailment. The defendant was not in possession of the goods simply because they were in its shanty cars, any more than a landlord would be in possession of his tenant's household effects simply because he had furnished the tenant a house to live in. 6 Corpus Juris, 1102.

The motion of non-suit is allowed.

Reversed.

Note.—Distinction Between Duties Devolved by Law and those by Contract as Excused by Act of God.—The instant case proceeds on the principle that there was no duty whatever in the railroad to protect the property involved from the destructive consequences of an act of God, at the same time arguing that there was no duty even to protect it though destroyed not through act of God. Taking it, however, that there is a situation or room for a reasonable contention as to a situation in which the defendant owed a duty to

plaintiff to protect the property involved, what is the rule as to act of God causing its destruction?

At an early day the rule was laid down that, if a party by contract creates a duty on himself he is bound to make it good notwithstanding by any accident or inevitable necessity performance has been rendered impossible. *Paradine v. Jane* (1647), Aleyn (Eng.) 26. It was said he should have provided against this in his contract. But it has been said that: "Where the law creates a duty or charge and the party is disabled to perform it without any default in him and he hath no remedy over these, the law will excuse him." If, however, he creates a charge upon himself, *secus*. *Clifford v. Watts* (1870), L. R. 5 C. P. (Eng.) 577. It has been held also that actual adjudications come far short of sustaining the rule as broadly stated in the *Paradine* case. *Pengra v. Wheeler* (1893), 24 Or. 532, 34 Pac. 354, 21 L. R. A. 726.

In *Bunn v. Prather* (1859), 21 Ill. 217, it is stated, that "When the law casts a duty on a party, the performance shall be excused by act of God, but when a party by his own contract engages to do an act, it is deemed his own fault and folly, that he did not expressly provide against contingencies and exempt himself from responsibility in certain events." To this principle a very great abundance may be cited, for example: *First Nat. Bank v. McConnell* (1908), 103 Minn. 340, 114 N. W. 1129, 14 L. R. A. (N. S.) 616, 123 Am. St. Rep. 336, 14 Ann. Cas. 396.

This distinction between duty cast by law and one arising out of contract is well illustrated in *Merriwether v. Quincy O. & R. C. R. Co.*, 128 Mo. App. 647, 107 S. W. 434, which held that though a railroad is bound to keep on hand cars to accommodate ordinary traffic, yet it is excused from so doing by act of God, but this has no application to a special contract to furnish cars at a particular time and place. And so it has been said that whether the continued existence of the subject-matter of the contract will be implied as a condition of performance of the contract and not a question of inevitable accident excusing non-performance. *Dexter v. Norton* (1871), 47 N. Y. 62, 7 Am. Rep. 415.

An interesting case is that of *Berg v. Erickson*, 234 Fed. 817, 148 C. C. A. 415, where the distinction between a positive agreement and duty imposed by law is pointed out is quite elaborately treated by Sanborn, C. J. It was said: "Whether or not one, who by contract imposes upon himself our obligation or duty, is absolved from liability for his non-performance by a subsequent impossibility of performance caused, without his fault, by an act of God or an unavoidable contract, depends on the true construction of his contract." Many cases are cited in support of this proposition.

But our Supreme Court has held that "where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by merely general words, which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens." *Chicago, M. & St. P. R. Co. v. Hoyt* (1892), 149 U. S. 1, 37 L. ed. 625, 13 Sup. Ct. 779. In this case it seems, that the distinction between duties imposed by con-

tract and those devolved by law is not so sharp as shown in other cases to which reference is above made. This case makes construction of contract take a wider range than they admit.

Take it, then, that the servant, in the instant case, was expected to maintain the shanty that was destroyed, and it became the duty of the railroad to protect it. In such case it makes no difference what is the measure of its duty, whether of ordinary or extraordinary care, as in either event the act of God excuses it. C.

BOOK REVIEW

COLLIER ON BANKRUPTCY—ELEVENTH EDITION.

The first edition of Collier on Bankruptcy appeared in September, 1898, and two months later there was an enlarged edition. Now, in 1917, appears the Eleventh Edition, the intervening editions being by Mr. James W. Eston in 1900, Mr. Wm. H. Hotchkiss in 1903, and the remaining editions, five to seventeen inclusive, being by Mr. Frank B. Gilbert, of Albany, N. Y., bar.

This work's appearance is anticipated with interest by the profession, the plan of the author of the original and third editions being scrupulously followed by the succeeding editors, as it had met the general approval of the profession. It is superfluous further to speak of a work regarded as a necessity, especially as we have enlarged on this subject in various numbers of Central Law Journal. Its copyright in the first two years of the life of this work has been by Matthew Bender & Company, of Albany, N. Y., and the present edition, eleventh, is in the year 1917, reindexed and further enlarged to include new rulings down to date.

BOOKS RECEIVED.

Handbook of Criminal Procedure. By Wm. L. Clark, Jr., author of *Clark's Handbook of Criminal Law* and *Clark's Handbook of the Law of Contracts*. Second Edition. By William E. Mikell, B. S., LL.M., Professor of Law in the University of Pennsylvania. St. Paul. West Publishing Co. 1918. Price \$3.75.

HUMOR OF THE LAW.

Unfortunately we've mislaid the judge's name, but his court-room is in New Bedford, Mass. Before him appeared a defendant who, hoping for leniency, pleaded, "Judge, I'm down and out."

Whereupon said the wise Judge:

"You're down, but you're not out. Six months."—*Philadelphia Evening Ledger*.

Secretary Daniels, in his Ohio address declared fair and constructive criticism of the government's acts never should be checked, but appealed to the sense of justice of America's citizenship in asking that carping and continual petty criticism be silenced in this time of war.

"Like it is told of a great man who was always critical of everything," he said:

"When this man died, word of his death was carried to Andrew Lang.

"'Poor man, poor man,' said Lang. 'He won't like God.'

In a suit in a Georgia court the attorney for defendant told the jury that his opponent would make some humorous remarks, and that he "would tell a joke at a funeral."

Whereupon, counsel for plaintiff said:

"Gentlemen of the Jury: The learned gentleman has just told you that I would make you laugh and he said that he believed that I would tell a joke at a funeral. If the corpse smiles at us, should we not be permitted to smile at the corpse? When the skeleton is all the time grinning at us, should we not reciprocate? Why, gentlemen, the funniest things which ever occur happen at funerals." And continued: "A certain man married the only daughter of a widow. The young couple decided to go across the ocean on their bridal tour. The mother-in-law decided she would go too. She went. When they got about half way across the ocean, the old lady became ill and died, which was a perfectly natural event; they had no iron weights with which to sink the casket, so they tied a bag of coal to the casket and let her gently down into her watery grave. The bereaved son-in-law, commenting on the funeral arrangements, said: 'I—I—a—l—ways k—k—knew w—w—where m—m—my mother-in-law was a—goin', but I—I—I'll be b—b—blamed if I thought she'd have to take her own fuel with her.' Why, gentlemen, a man who would not enjoy a funeral like that has never had a mother-in-law and is not worthy of one."

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
Last Resort and of ALL the Federal Courts.**

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1. Alteration of Instrument—Filling Blanks.—Insertion of words "four months" in blank space before words "after date," held not material alteration of note; payee having prima facie authority to fill in blank in view of Negotiable Instruments Act, § 14.—Howard Nat. Bank v. Arbuckle, Vt., 102 Atl. 477.

2. Animals—Running at Large.—Where bull broke inclosure and entered upon plaintiff's land, he was "running at large," within Comp. Laws 1915, §§ 7305, 7306.—Hosley v. Bamber, Mich., 165 N. W. 687.

3. Assault and Battery—Shooting at Another.—Unlawfully firing a pistol at another, while near enough him to injure him, if the bullet hits him, is an assault, though the bullet does not hit him.—State v. Licher, Del., 102 Atl. 529.

4. Attorney and Client—Admissions of Record.—In suit by railway against landowners, announcement of their attorney in court, approved by court, held to settle question that landowners' deed to railway was knowingly executed by them as substitute for their prior conveyance.—Oregon-Washington R. & Nav. Co. v. Reed, Ore., 169 Pac. 342.

5. Contract.—Where, under a contract, plaintiff, an attorney, is to assist a trial attorney as plaintiff shall "consider necessary," it is no defense, in an action on the contract, the execution of which is admitted, that plaintiff

was out of town during the trial.—Strong v. Eckert, N. Y., 167 N. Y. S. 1069.

6. Ratification.—Where one has been made a party plaintiff by unauthorized act of attorney, and before judgment has informal notice thereof, his failure to appear and move to strike his name from record will not, in all circumstances and as matter of law, amount to ratification of such unauthorized act.—Anderson v. Crawford, Ga., 94 S. E. 574.

7. Bailment—Benefit of Bailor.—A contractor, who takes cloth on which he is to do work, is only liable for such cloth as a bailee, and can show that his failure to return goods, which he had placed in the hands of a subcontractor, was not due to any lack of care on his part.—Kash v. Krebs, N. Y., 167 N. Y. S. 1035.

8. Banks and Banking—Depositor.—Bank whose cashier withdrew from bank the amount of a receipt for money to be transferred to husband's account signed by a depositor and misappropriated, it was liable to depositor's husband.—Gonder v. Farmers' Nat. Bank of Somerset, Pa., 102 Atl. 510.

9. Special Deposit.—Under Gen. Code, § 4291, a bank knowingly receiving municipal funds from a city treasurer, which it did not hold as a special deposit, and from the use of which it realized profits, was a trustee accountable to municipality for funds and all profit on the deposit.—Franklin Nat. Bank of Newark v. City of Newark, Ohio, 118 N. E. 117.

10. Bankruptcy—Exemption.—A bankrupt should not be denied his homestead exemption because of his transfer of homestead, where it was retransferred to him, and transfer was not made with intent to prefer creditors.—In re Najour, U. S. D. C., 246 Fed. 167.

11. False Representation.—Under Bankr. Act, § 14b, as amended in 1903 and 1910, discharge cannot be denied because of general materially false statement in writing to commercial agency on which creditor extended credit, but which was not made for specific purpose of obtaining credit.—J. W. Ould Co. v. Davis, U. S. C. C. A., 246 Fed. 228.

12. Preference.—Judgment of referee in bankruptcy, disallowing on objections by trustee, claim against bankrupt's estate on ground that claimant had received preference, is admissible in evidence in subsequent suit by trustee to recover preference.—Ullman, Stern & Krausse v. Coppard, U. S. C. C. A., 246 Fed. 124.

13. Referee.—Decision of referee, based on hearing where witnesses were personally examined by him, should not be interfered with, unless clearly wrong.—In re Najour, U. S. D. C., 246 Fed. 167.

14. Bills and Notes—Evidence.—In action on notes, letters from plaintiff to a defendant, stating plaintiff would look to him for payment of note referred to, written before notes declared on were indorsed by defendant and his wife, were inadmissible.—Kumin v. Fine, Mass., 118 N. E. 187.

15. Good Consideration.—The acceptance of a note for a portion of an account then due is at least an agreement for delay; the subjecting of the debtor to peculiar liabilities and the affording to the creditor of peculiar rights con-

stituting a good "consideration."—Walter H. Goodrich & Co. v. Friedman, Conn., 102 Atl. 607.

16. **Carriers of Live Stock**—Notice.—Under uniform live stock contract filed with Interstate Commerce Commission, under which interstate shipment was had, held, that written communication by company's local agent at point of destination regarding injury was sufficient notice of claim to warrant recovery.—Snyder v. King, Mich., 165 N. W. 840.

17. **Carriers of Passengers**—Anticipating Injury.—Street railway operating cars in subway was bound to exercise highest degree of care to protect passenger from injury caused by misconduct of other passengers, which ought to have been anticipated.—MacGillivray v. Boston Elevated Ry. Co., Mass., 118 N. E. 166.

18.—**Ordinary Care**.—Where a suburban trolley, on account of a public improvement in the road, had to transfer the passengers through the woods, it owed at least ordinary care in leading them through the wood and in seeing that the path was reasonably safe.—Ins v. Connecticut Co., Conn., 102 Atl. 595.

19. **Commerce**—Admissibility of Evidence.—While Interstate Commerce Commission in making investigations should not be too narrowly constrained by technical rules as to admissibility of evidence, etc., commissioners cannot act on their own information, and parties must be apprised of evidence.—Atchison, T. & S. F. Ry. Co. v. Spiller, U. S. C. C. A., 246 Fed. 1.

20.—**Interstate**.—Employee of electric railway which transported interstate shipments, held engaged in "interstate commerce," within federal Employers' Liability Act, when injured boarding car on which track-fixing crew, of which he was a member, rode.—Cholerton v. Detroit, J. & C. Ry., Mich., 165 N. W. 606.

21.—**Tax**.—A tax under Laws 1911, c. 169, § 11, requiring any company owning cars operated on any railroad in the state, to pay a tax, is not a tax on interstate commerce, in case of cars used only in interstate commerce.—Vera Chemical Co. v. State, N. H., 102 Atl. 463.

22.—**Public Service Commission**.—Order of state Public Utilities Commission that interstate carrier distribute coal cars in time of shortage to mines within the state, as required by Public Utilities Act, § 52, held not invalid as an interference with interstate commerce, notwithstanding Hepburn Amendment of 1906 to Interstate Commerce Act.—State Public Utilities Commission v. Baltimore & O. S. W. R. Co., Ill., 118 N. E. 81.

23. **Contracts**—Rescission.—Where producer of motion picture was to have share of gross receipts, exhibitor's false reports of the gross receipts and refusal to allow producer access to the books, as agreed, held to justify the producer in rescinding.—Raftery v. World Film Corp., N. Y., 167 N. Y. S. 1027.

24. **Corporations**—Acquiescence.—Acquiescence by stockholders after such length of time and in such circumstances that knowledge of acts done by directors beyond their authority is to be inferred will operate as ratification.—West Side Irr. Co. v. United States, U. S. C. C. A., 246 Fed. 212.

25.—**Executed Contract**.—A contract whereby plaintiff agreed to sell and a corporation

agreed to buy certain stock at a price named, payable on a certain date, was an executed contract, and where plaintiff tendered the stock, the corporation became instantly liable for the price, and when it failed to pay, it became liable for the full sum.—Lewin v. Hanford, Cal., 169 Pac. 242.

26.—**Sale**.—A contract for sale of its personal property, unauthorized by a corporation, executed by a part of the stockholders in their individual capacity, is insufficient to vest title in the buyer.—Robinson v. Taber, Mich., 165 N. W. 730.

27. **Covenants**—Building Restrictions.—An agreement, canceling existing building restrictions and providing that structures "to be erected" and that "shall be erected" should be private residences, only, did not restrict the use to which existing residences should be put.—Barnard v. Swayne, N. Y., 167 N. Y. S. 1060.

28. **Damages**—Measure of.—To arrive at value of building, to determine damages by fire, where building has no market value cost, uses it has been put to, age, condition, and location should be considered; and price at which an owner contracted to sell it, while competent, is not controlling.—Fite v. North River Ins. Co., Mich., 165 N. W. 705.

29. **Death**—Proximate Cause.—Where deceased would not have died when he did but for cerebral meningitis from injury inflicted by defendant, such meningitis held a concurring proximate cause, for which defendant was liable, though pneumonia was also a concurring cause.—Marks v. Reissinger, Cal., 169 Pac. 243.

30. **Deeds**—Undue Influence.—Where a father, about 95 years old, conveyed his property to a son without any consideration, and without competent, independent advice, the conveyances were void.—Moriarty v. Kelly, N. J. 102 Atl. 443.

31.—**Undivided Interest**.—Under deed conveying lot and undivided interest in strip of land between lake and parcel of which such lot was a part, held, grantees took title in fee to undivided interest in water frontage, and could make conveyance of lot and retain title to such frontage.—Bell v. Reid, Mich., 165 N. W. 789.

32.—**Restriction on Buildings**.—Home for nurses of nearby hospital is not "residence," within deed restricting building of other than residences.—Hartwig v. Grace Hospital, Mich., 165 N. W. 827.

33. **Eminent Domain**—Amending Judgment.—A judgment in eminent domain for damages for land taken by a drainage district is not a judgment quod recuperet, but merely an adjudication of just compensation, and when the amount was paid to the county clerk, it was no longer subject to the court's orders, but until accepted could be withdrawn by the district.—Lingle v. Clear Creek Drainage and Levee Dist., Ill., 118 N. E. 77.

34.—**Evidence**.—In eminent domain, it was not reversible error to admit testimony that the property owner's estimate of value for purpose of taxation was lower than stated in his testimony in the eminent domain proceedings, where the amount of the assessment was not permitted to be proved.—McGaw v. City of Baltimore, Md., 102 Atl. 544.

35.—**Similar Public Use.**—Property already appropriated to one public use cannot thereafter be condemned for inconsistent public use unless such taking is authorized expressly or by clear implication, and this rule applies to property about to be lawfully appropriated to a public use, though appropriation is not complete.—*East Hartford Fire Dist. v. Glastonbury Power Co.*, Conn., 102 Atl. 592.

36. **Equity—Foreign Corporation.**—Where one purchases stock and enters into a contract with a foreign corporation which cannot make a valid contract because of failure to comply with state laws, and he repudiates the transactions, and there is no showing of fraud or concealment or insolvency, there is an adequate remedy at law and equity has no jurisdiction.—*Flint v. Le Heup*, Mich., 165 N. W. 626.

37.—**Escrows.**—Under husband's written contract to convey homestead, occupied by himself and wife, the wife having been coerced to sign the contract, the person holding a deed for premises in escrow has no authority to deliver it to purchaser.—*Ambler v. Jones*, Neb., 165 N. W. 886.

38. **Estoppel — Conveyance.**—There is no estoppel under deed conveying house lots on way, describing them as bounded westerly by easterly line of way, and granting grantor's rights in common with other tenants in way of ingress and egress, etc., where title came back into grantor, and parties adverse to his successors claim nothing thereunder.—*Apsey v. Nash*, Mass., 118 N. E. 180.

39.—**Duress.**—Where complainant, ignorant negro, was acting under duress when, defendant sued out distress warrant and subjected crops raised on land sold complainant under parol contract to alleged claim for rent, defendant cannot set up, as estoppel barring specific performance, proceedings under distress warrant.—*Hicks v. Fordham*, U. S. C. C. A., 246 Fed. 236.

40.—**Husband and Wife.**—Where plaintiff's husband in 1909, executed and delivered warranty deed, apparently, though not actually, executed and acknowledged by wife, and where she, with knowledge, acquiesced and accepted and retained benefits, and did not bring action for partition, etc., until 1915, she was equitably estopped from maintaining action.—*Fuller v. Johnson*, Minn., 165 N. W. 874.

41. **Fraud — Misrepresentation.**—Where defendant, selling motion picture theater to plaintiff, misrepresented it was doing profitable business, matter peculiarly within his knowledge, he could not deny liability for fraud on ground plaintiff should have made further investigations and that doctrine of *caveat emptor* applied.—*Johnson v. Campbell*, Mich., 165 N. W. 823.

42. **Frauds, Statute of—Contract.**—A verbal contract by an execution creditor extending the time for redemption is not within the statute of frauds.—*Pellston Planing Mill & Lumber Co. v. Van Wormer*, Mich., 165 N. W. 724.

43.—**Contract for Services.**—An oral contract for services in consideration of payment when promisor should receive share of estate of his father, not then deceased, merely fixed time of payment and hence was not within statute of frauds as creating an interest in land.—*Macfarland v. Callahan*, Neb., 165 N. W. 889.

44. **Fraudulent Conveyances—Consideration.**—Where a man owed his sister nearly \$500, and had owed it for seven years, satisfaction thereof was not sufficient consideration as against creditors, to sustain his deed of all property bringing in a net income of over \$900 a year, though the sister further agreed to support him for life.—*Wilmer v. Placide*, Md., 102 Atl. 541.

45.—**Intent.**—Where plaintiff sued his debtor, who, with intent to defraud, conveyed to another, and later, to cover a defalcation of the debtor, a trust agreement was made in favor of defendant by which defendant advanced the money to care for the defalcation in return for a mortgage on the lots, defendant, having had no previous notice of the fraudulent intent, acquired good title in view of *L. O. L.*, § 7401.—*People's Bank v. Rostad*, Ore., 169 Pac. 347.

46. **Gas—Deposit by Consumer.**—Where consumer contracted separately for electric current and for gas with same company, depositing \$20 on electric current contract, company was not required to apply deposit to arrears on gas bill before shutting off supply.—*Annapolis Public Utilities Co. v. Martin*, Md., 102 Atl. 465.

47. **Habeas Corpus—Day in Court.**—Person denied full and fair hearing on claim of exemption under the Conscription Act, may, if restrained of his liberty, sue out a writ of habeas corpus.—*Angelus v. Sullivan*, U. S. C. C. A., 246 Fed. 54.

48.—**Jurisdiction.**—Excess of sentence beyond jurisdiction of court which imposes it, in case in which it has ample jurisdiction of subject-matter of case and of parties, is void, and prisoner held under such excess alone is entitled to his release by *habeas corpus*.—*Stoneberg v. Morgan*, U. S. C. C. A., 246 Fed. 98.

49. **Highways—Husband and Wife.**—The wife of one obstructing a highway need not be joined in action to enjoin the obstruction, merely because she is a co-owner with him of the adjoining premises.—*Sherwood v. Ahart*, Cal., 169 Pac. 240.

50. **Husband and Wife—Divorce.**—Where wife holding title to property conveyed by husband, gave him power of attorney to sell or transfer, power did not authorize him to convey to himself through intermediary just before he sued for divorce for desertion.—*English v. English*, Mass., 118 N. E. 178.

51.—**Tenancy in Common.**—Where husband and wife agreed to convey their farm, held as tenants in common, to nephew in return for his support, wife's refusal to join in conveyance and perform did not terminate contract.—*Lavoie v. Dube*, Mass., 118 N. E. 179.

52. **Injunction—Covenant.**—Where a landlord covenanted not to rent another part of his building to any business selling candy, ice cream, light lunches, soda water, or other things sold in the business of general confectioners, injunction will not be granted to enjoin the installing of a restaurant where the "light lunch" feature was not relied on for the injunction.—*Shean v. Weeks*, Cal., 169 Pac. 231.

53. **Insurance—Breach of Condition.**—Insurance contract conditioned to become void on breach of condition present or subsequent, does not mean that upon breach contract is a nullity.

but only that upon insured's breach of covenants insurer shall not be bound by his covenants.—Beauchamp v. Retail Merchants' Ass'n Mut. Fire Ins. Co., N. D., 165 N. W. 545.

54.—Evidence.—That local agent issued all policies of fire insurance on building is of considerable probative force that building was worth more than it was insured for, where other competent evidence is lacking.—Fite v. North River Ins. Co., Mich., 165 N. W. 705.

55.—Indemnity.—Under policy indemnifying employer against loss by injury to employees, but expressly excluding "demolition or wrecking of any structure," injury during removal of partition wall in course of remodeling and repairing adjoining buildings was not within exception.—Pilgrim v. Aetna Life Ins. Co., N. J., 102 Atl. 445.

56.—Special Agent.—Under a special agent's contract to solicit life insurance, etc., providing that "during the continuance of the agreement" without any violation of its terms he should be paid certain commissions on renewal premiums, he was not entitled thereto after termination of contract.—Bowles v. Sawyer, Me., 102 Atl. 562.

57.—Sunstroke.—Sunstroke of traffic policeman while performing his duties in usual way, held within policy insuring against bodily injuries sustained solely through accidental means.—Higgins v. Midland Casualty Co., Ill., 118 N. E. 11.

58.—Fatal Disability.—Under health policy requiring payment for illness wholly preventing assured from performing any duty, during which he shall be necessarily confined to the house, assured could not recover for an illness which practically incapacitated him, but during which he visited his office for a few minutes each day, and also called upon a doctor each day.—Pirscher v. Casualty Co. of America, Md., 102 Atl. 546.

59. **Intoxicating Liquors—Intent.**—The fact that a druggist stored five quarts of whisky in his home is not sufficient evidence, standing alone, to show intent to dispose of it unlawfully, nor to show any violation of Rem. Code 1915, §§ 6262—1—6262—33.—State v. Snell, Wash., 169 Pac. 320.

60. **Landlord and Tenant—Lease.**—In action for damages for refusal to permit plaintiff to go into possession of premises, which he claimed had been leased by defendant, charge that agreement was a lease, unless made subject to collateral conditions, and unless there was to be a formal lease to be delivered thereafter, was erroneous, taking from jury question whether parties made lease or agreement to make a lease.—Garber v. Goldstein, Conn., 102 Atl. 605.

61.—Repairs.—Where there was no competent evidence, at time tenant paid rent and went into possession, of an agreement on such day to repair a walk, any subsequent agreement to repair would be without consideration and unenforceable.—Brown v. Gray, Mich., 165 N. W. 624.

62.—Waiver.—The tender of a bill for the rent reserved under a lease and the acceptance of payments thereunder was a waiver of any defaults by the lessee existing prior to that date.—Commercial Trust Co. v. L. Wertheim Coal & Coke Co., N. J., 102 Atl. 448.

63. **Life Estate—Receivership.**—Life tenant must keep premises in such repair as to preserve property from decay, to extent at least of its rental value, and, on his neglect to do so, receiver will be appointed to collect rents sufficient to pay taxes and for repairs.—Woolston v. Pullen, N. J., 102 Atl. 461.

64. **Master and Servant—Accident.**—Railroad car inspector injured while taking short cut to report to railroad with which his employer exchanged services of employees under certain conditions, held hurt by accident arising out of his employment within Workmen's Compensation Act.—In re Maroney, Ind., 118 N. E. 184.

65.—Accident.—In a proceeding for compensation under Indiana Workmen's Compensation Act for death of a janitor by an electric shock while cleaning a room wherein he had been

forbidden to enter and against which he had been warned, evidence held sufficient to sustain a finding that the accident arose out of and in the course of his employment.—Northern Indiana Gas & Electric Co. v. Pietzvak, Ind., 118 N. E. 132.

66.—Assumption of Risk.—One employed to operate a drilling machine in a mine, held not as a matter of law to assume risk of injury from falling rock at place other than his immediate place of work, though he was required to inspect his place of work.—Ulrich v. Utah Apex Mining Co., Utah, 169 Pac. 263.

67.—Burden of Proof.—It was not incumbent on claimant for compensation for death under Workmen's Compensation Act to show it was for best interests both of her and of employer to have compensation commuted to lump sum.—Schwartz v. George Thomson & Sons Co., Ill., 118 N. E. 95.

68.—Contributory Negligence.—Employer's failure to place blue flag in front of railroad car under which he was working, as required by a rule, held not contributory negligence, unless he had been instructed to do this.—Campbell v. New York, N. H. & H. R. Co., Conn., 102 Atl. 597.

69.—Course of Employment.—Under Workmen's Compensation Act (Rev. St. 1913, § 3651) providing compensation for injury to an employee "by accident arising out of and in the course of employment," compensation is not recoverable for a disease unless it is traceable to an "accident" as defined by § 3693.—Blair v. Omaha Ice & Cold Storage Co., Neb., 165 N. W. 893.

70.—Course of Employment.—A bridge builder having finished work for the day, when struck by lightning while sitting in the boarding tent furnished by the employer, did not receive an injury arising out of his employment.—Griffith v. Cole Bros., Ia., 165 N. W. 577.

71.—Course of Employment.—Although when night switchman was injured, he had completed his hours of active service for night, and was proceeding to entrance of plant to register out, which was a further duty of his employment, his injury was suffered in the course of the employment.—Inland Steel Co. v. Lambert, Ind., 118 N. E. 162.

72.—Dependency.—On issue of dependency, son's contribution of \$27 to his father, though given for purchase of articles of household furniture, could have been adjudged a "contribution to support" of the father within Workmen's Compensation Act.—In re McMahon, Mass., 118 N. E. 189.

73.—Hours of Service Act.—If sudden sickness of a railroad telegraph operator was emergency, within Hours of Service Act, § 2, held, that carrier could not escape liability where operator then on duty, before being relieved, was kept on duty for more than 13 hours, though there was another operator near by who might have been called.—United States v. Delano, U. S. C. C. A., 246 Fed. 107.

74.—Safe Place.—The rule of safe place, as generally understood, cannot apply where employee of owner of building in course of construction was injured by fall of scaffolding which he was engaged in constructing and working on.—Porth v. Cadillac Motor Car Co., Mich., 165 N. W. 698.

75.—Workmen's Compensation Act.—Where a fence builder for a railroad reported each morning at a station for instructions and was paid from the time he left the station, but one morning on account of rain he did not go to the station and the foreman came and asked him to work and he went down the track, direct for the work and was killed on the way, the relation of master and servant existed, within Workmen's Compensation Act.—Porritt v. Detroit United Ry., Mich., 165 N. W. 674.

76.—Workmen's Compensation Act.—Where fire insurance agent slipped on icy sidewalk while proceeding from his train to hotel in town to which his employer had sent him, injury arose out of his employment within Workmen's Compensation Act.—In re Harraden, Ind., 118 N. E. 142.

77.—**Workmen's Compensation Act.**—Employe driver who sat down near boiler fire while waiting opportunity to use elevator in his work, fell asleep, and caught fire, held injured in course of his employment within Workmen's Compensation Act.—Richards v. Indianapolis Abattoir Co., Conn., 102 Atl. 604.

78. **Municipal Corporations** — Discretion.—Under Gen. Code, § 10129, empowering municipality to grant franchise subject to "regulations and restrictions," etc., its officers have large latitude, and unless expressly limited, may exercise such power in any reasonable way compatible with best service and greatest advantage to it.—Federal Gas & Fuel Co. v. City of Columbus, Ohio, 118 N. E. 103.

79.—**Intoxication.**—Under supplement of 1913, to Disorderly Persons Act (P. L. 1913, p. 103), making it an offense to drive an automobile upon a public street "while under the influence of intoxicating liquors," covers the usual conditions of intoxication, though one need not be so intoxicated that he cannot safely drive a car.—State v. Rodgers, N. J., 102 Atl. 433.

80.—**Licensee.**—Pedestrian injured by the fall of awning while waiting for street car did not forfeit her rights as licensee on public streets by lingering in front of shop window.—Leighton v. Dean, Me., 102 Atl. 565.

81.—**Nuisance.**—Offense of driving an automobile upon a public street while under influence of intoxicating liquor, prohibited by supplement of 1913 to Disorderly Persons Act (P. L. 1913, p. 103), is complete when thing prohibited is done, as distinguished from a public or common nuisance which is not committed unless and until there is inconvenience or annoyance to public.—State v. Rodgers, N. J., 102 Atl. 433.

82.—**Registration of Motor Vehicles.**—The word "owner," in Motor Vehicle Law, §§ 2, 19, providing that no suit could be had for injuries to a car unless the owner registered it, refers to any person having an interest in the property even under a special title.—Brown v. New Haven Taxicab Co., Conn., 102 Atl. 573.

83.—**Sidewalks.**—In an action against a city on account of a defective walk, where the question was whether the walk would have washed out if properly constructed, it was error to admit evidence of the defendant that the walk was put in again properly and that it washed out, where the amount of rainfall in the first instance was much less than in the second instance.—Kethledge v. City of Petoskey, Mich., 165 N. W. 788.

84.—**Street Grading.**—Resolution ratifying erection of retaining wall necessitated by grading of street, where committee acted in response to informal direction of common council, is as valid as if work had not been done until after passage of resolution.—Hackett v. Hussels, N. J., 102 Atl. 527.

85. **Partition**—Action for.—One who had parted with all his right, title and interest in vein of coal under lands in which he retains interest could not maintain proceeding to partition entire tract, including coal.—In re Young's Estate, Pa., 102 Atl. 506.

86. **Principal and Agent**—Evidence.—The agency of the men with whom plaintiff dealt in purchasing lots is sufficiently shown by defendants' acceptance of the notes given by him and by their execution and delivery of land contracts.—Billig v. Goodrich, Mich., 165 N. W. 647.

87.—**Proof of Agency.**—Where bank cashier withdrew a certain amount from a depositor's account, that he deposited with bank's papers a receipt signed by himself for depositor, did not establish his agency to withdraw amount, or justify the submission of question of agency to jury.—Gonder v. Farmers' Nat. Bank of Somerset, Pa., 102 Atl. 510.

88.—**Scope of Agency.**—Selling agent, apparently authorized to do automobile company's business, could convey good title to bona fide purchaser of automobile belonging to company, although in making the sale he failed to disclose that he was acting as agent.—Lister, Smith & Walsh Co. v. Smith, R. I., 102 Atl. 514.

89. **Railroads—Crossings.**—In suit by railway against landowners to enjoin interference

with right of way and to quiet title, trial court properly restricted right of landowners to private crossing of track to be maintained by them at place designated in latest conveyance to railway's predecessor.—Oregon-Washington R. & Nav. Co. v. Reed, Ore., 169 Pac. 342.

90. **Sales—Fraudulent Statement.**—Horse with the glanders at any stage is not "sound," and to so state is fraudulent.—Weinberg v. Ladd, Mich., 165 N. W. 711.

91. **Specific Performance—Evidence.**—A town seeking specific performance of option to buy waterworks cannot take without pay parts not laid or the price of which was not ascertained as provided by the contract.—Town of Boonton v. United Water Supply Co., N. J., 102 Atl. 454.

92. **Street Railroads—Contributory Negligence.**—An automobile driver who crosses a street car track without looking in the direction from which a street car has just passed, but who looked in that direction when 60 to 120 feet away, and who knew that at that time cars were usually hurrying in that direction to the car barns, is guilty of contributory negligence.—Congdon v. Michigan United Traction Co., Mich., 165 N. W. 744.

93. **Sunday—Contract.**—A conversation between the tenant and the landlord's janitor on Sunday, by which the janitor agreed that a walk should be repaired, does not constitute a valid contract with the landlord.—Brown v. Gray, Mich., 165 N. W. 694.

94. **Vendor and Purchaser** — Estoppel.—Where married men contracted to sell land, title to which was held by their wives, although evidence indicated they were not the owners, purchaser, not having been injured and deed from wives having been tendered, cannot defeat contract on ground that it was induced by fraudulent representations.—Crump v. Schneider, U. S. C. C. A., 246 Fed. 225.

95. **Waters and Water Courses—Abandonment.**—Where defendant mutual irrigation company executed contract with government, limiting its appropriation of water, and government proceeded with reclamation project based on such contract, defendant cannot defeat contract on theory that it should not be construed as abandonment of rights of its stockholders.—West Side Irr. Co. v. United States, U. S. C. C. A., 246 Fed. 212.

96.—**Option.**—A town under option to purchase waterworks, providing for pipes being laid with its approval, may not take such parts only as it approved; the subsequent resolution of council, vote of people, and prayer of bill being for system as in use.—Town of Boonton v. United Water Supply Co., N. J., 102 Atl. 454.

97. **Will—Intent.**—It being probable that when testatrix used expression "my whole estate, real and personal," it was equivalent to saying "all my real estate and personal property," intent may be gathered from will in light of surrounding circumstances.—Moseley v. Bogy, Mo., 198 S. W. 847.

98.—**Unincorporated Association.**—Under will devising property to "Allegheny County Children's Aid Society of Allegheny County, Pennsylvania," a then existing unincorporated body known as Children's Aid Society of Allegheny County, thereafter incorporated, was entitled to property as against an organization known as the Children's Aid Society of Western Pennsylvania, Allegheny County Auxiliary.—In re Neel's Estate, Pa., 102 Atl. 503.

99.—**Life Estate.**—Devise "to J. his natural life, * * * and upon his death to his children, if any, and if he should die without leaving any living children or should die with children and they should die, thereupon or at their death * * * to be equally divided between C., C., and S." gave a life estate to J., with remainder in fee to his children, and, there being children, C., C., and S. would receive nothing unless both J. and his children should die before the testatrix.—Bibby v. Broome, Miss., 76 So. 835.

100.—**Wife's Life Estate.**—Under will devising all testator's property to his wife in trust, for benefit of herself and her children, and giving her its entire use and management for life, with power of sale, etc., she took only a life estate in an undivided interest in the property.—Patterson v. Gaisser, Ga., 94 S. E. 563.

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LEGITIMATING STATUTES RECOGNIZED IN OTHER STATES THAN THAT OF DOMICILE.

Conflicting laws of our different states regarding causes for divorce, along with questions regarding the obtaining of divorce upon service by publication and of the *bona fides* of residence bring the matrimonial residence within jurisdiction, have occasioned much discussion in American courts. An inquiry by Massachusetts Supreme Judicial Court into legitimating statute of another state and its recognition in Massachusetts is cognate to what is above spoken of, at least in so far as innocent offspring are concerned. *Green v. Kelley*, 118 N. E. 235.

The facts in this case show that the father of two sets of children was first legally married in the State of Michigan, and by that marriage one child was born. He deserted his Michigan wife and settled in Indiana. While this wife was still living and undivorced he went through a form of marriage in Indiana to a woman innocent of the fact that he had a living wife. By this union or living together two other children were born. It was provided by Indiana statute that if a void marriage was contracted with one having the reasonable belief that no disability by the other to contract marriage existed, the issue of such void marriage begotten before discovery by the innocent party of existence of disability "shall be deemed legitimate." In this case the two children by the void marriage claimed to be lineal descendants, along with the other child, of their father, who if living would have been entitled to an estate in remainder in Massachusetts.

The court, after stating that the status of a person as to legitimacy depends upon the law of his domicile," says: "Such status

is recognized according to the principles of international law in other countries and states unless contrary to the positive law or to public policy of the sovereign state where it is drawn in controversy or so repugnant to good morals as to be improper to recognize. * * * Removal of the obstacles to the legitimation of innocent children, who have no responsibility for the circumstances of their birth and thus ameliorating some of the apparent harshness of the common law, has been the progressive policy of our law as illustrated by statutes and decisions. It is not contrary either to the statute law or the public policy of this commonwealth that the children of a marriage, bigamous on the part of one parent, but innocent on the part of the other, should be declared legitimate to some extent and under some circumstances."

We would be willing to go further and subscribe to the principle, that even in meretricious union by two guilty parents, holding themselves out to the world as man and wife and so recognized, ought to be recognized everywhere as legitimate, especially if a statute of the domicile so considers them. If they are innocent victims, it is no reason why their innocence should be penalized in another state, because both parents, instead of one only, are acting in bad faith.

How particularly, at all events, should public policy be offended, in recognizing claimants born elsewhere, on moral grounds, if the claimants had no sort of responsibility in the matter? It involves in no way the moral law of a state extending comity, that one participating in no way in infraction of moral principles shall not be held for the sins of his progenitors. There is no doctrine of original sin in statutory enactment, that puts a stain on birth, as some spiritual doctrine maintains is done. If to bastardize children puts a stain on offspring, such doctrine deserves confinement to plain words, with no implication in its favor. Society visits enough punish-

ment on an innocent, without law adding thereto. Questions of this kind arise in a variety of ways. Very often a situation is created where the parents in a union recognized in a foreign state are innocent of wrong. It is only incidental that questions of property rights in the children arise. Public policy in another state ought not to cut out rights of innocent children. In many cases the faith and credit clause may not control the matter. But humanity ought, so as to extend comity.

NOTES OF IMPORTANT DECISIONS.

POST OFFICE—NON-MAILABLE MATTER UNDER ESPIONAGE ACT.—The purpose of the Espionage Act is declared as not intended to repress legitimate criticism of Congress or the officers of government, but merely to prevent the dissemination and distribution through the mails of publications intended to embarrass and defeat the government in the successful prosecution of the war. To accomplish this purpose the judgment and discretion of the Postmaster General is relied on, and his decisions are conclusive unless clearly wrong. *Masses Pub. Co. v. Patten*, 246 Fed. 24, decided by Second Circuit Court of Appeals.

As to whether this involves or was intended to involve any question of free speech, it was said that matter of a certain character shall not be carried in the United States mails. This is held to say that the government may refuse facilities for the distribution of matter injurious to public morals or public policy.

That the Postmaster General could act in this sort of matter without a judicial hearing is held not opposed to regulation vesting ministerial functions in officers or even of private parties, where this has been recognized at the common law.

It is pointed out also, that not since the Sedition Law of 1798, has any such legislation been on our statute books until adoption of the Espionage Act, and the Sedition Law expired by its own limitation in 1801. In the Espionage Act it is pointed out that the original draft provided that every publication "containing any matter of a seditious, anarchistic or treasonable character" shall be non-mailable, was stricken out because this was too indefinite, and left too much room for construction. This,

however, shows that the Postmaster General nevertheless, is merely to be the judge of non-mailable matter under the act, but all that is required is for him to administer the law according to congressional intent. Cartoons, as well as printed matter, were held to come under the rule of exclusion, as well as literary language.

It would seem quite a claim for one having views, that might be deemed opposed to the policy of our government in the prosecution of the war, to claim that the government must aid him in their dessemination.

INSURANCE—TORPEDO BY SUBMARINE CAUSING INJURED TO DROWN WHEN ATTEMPTING TO ESCAPE.—In *Woods v. Standard Acc. Ins. Co.*, 166 N. W. 20, decided by Wisconsin Supreme Court, it was held, that under the provision of accident policy, excepting from liability loss under any circumstances from fire arms or from explosives, "or where injury is inflicted upon insured by any other person," the torpedoing of a vessel by a submarine was not the direct cause of death of insured, where the facts tended to show that death arose from drowning.

The court said: "The fair inference from the evidence is that after the Arabic was struck Mr. Woods adjusted upon himself a life preserver, got into a lifeboat and by some accident thereafter was drowned. There is no evidence that he was injured by contact with an explosive or any object displaced or put in motion by the explosive. * * * It may well be said that had no explosion occurred which resulted in the sinking of the Arabic, Mr. Woods would not have lost his life, but it cannot be said under the circumstances of the case that the explosion was the direct cause of his death within the meaning of the exception in the policy. In order to escape liability under the policy, it must appear that the explosion was the direct cause of the injury to the insured."

No doubt had it appeared that Mr. Woods was actually struck by the torpedo, or standing on some part of the ship where he would have been blown into sea and immediately drowned, his death would have been held the direct result of the explosion. How then, may his death from drowning after attempting to escape be held any different? He was precipitated into the ocean and the fact that he adjusted a life belt upon himself only mitigated but did not take away danger of losing his life, or that he was in a lifeboat. The element, into which he

was thrown or to which he jumped in an emergency, seems not to take away from the cause of death.

INJUNCTION—AVOIDING MULTIPLICITY OF SUITS IN ENFORCEMENT OF PENAL ORDINANCES.—In Sherman et al. v. Gilbert, 118 N. E. 254, decided by Supreme Judicial Court of Massachusetts, an exception claimed to the principle that equity will not restrain prosecution for infraction of a penal ordinance is considered.

In this case six merchants applied for injunction to enjoin the chief of police of a city against threatened prosecution under a statute prohibiting hawking and peddling. The bill claimed that plaintiffs were merchants carrying on business in other cities of the state and occasionally they had need of rooms in hotels of defendant's city for the display of samples of merchandise, whereby they effected the taking of orders for future delivery of goods, and they were threatened with prosecution under the statute against hawking and peddling; that this way of doing business was not a violation of such statute. They ask for determination of such question and injunction *pendente lite*. There was demurrer, which the Supreme Judicial Court sustains and orders dismissal of the suit.

The court refers to exceptions to the rule above stated, saying they exist where void or unconstitutional statutes or local ordinances are relied on in prosecutions and property rights would be injured irreparably.

The court said: "The jurisdiction in chancery thus recognized and exercised rests upon the fundamental and well-established equitable doctrine that private personal and property rights will be protected by injunction from threatened irreparable unlawful injury. The injunction against the institution of criminal proceedings is simply incidental to that main ground of equitable jurisdiction."

As to multiplicity of suits being avoided it was stated that this is taken into consideration along with the circumstance that there was no relief by appeal, and where as to a single complainant there has been "arbitrary, oppressive and revengeful conduct amounting to a settled malicious purpose to cause irreparable damage." But it is said that: "A possibility that complaints may be lodged against six persons is not enough under these circumstances to make out a case of multiplicity," and "the allegations as to repeated complaints are not sufficient to warrant the inference that the courts of this commonwealth will countenance

continued and oppressive prosecutions when once a genuine test case open to fair question has been presented and is on the way to final decision."

There were allegations in the bill, that a suit would take several months before a decision could be reached in the Supreme Judicial Court, but no averment as to any pending case being on the way to a final decision.

The allegation, therefore, about prevention of a multiplicity of suits had no effect in taking this case out of the rule as to there being no injunction in a suit to prevent enforcement against prosecution for an alleged crime. It seems that well might it be thought that this kind of multiplicity is not the kind to be noticed in a case of this kind. Each complainant stands singly as to the law, and the fact that several may be affected by such a prosecution is no reason for giving to the combination rights not singly to be recognized.

BANKRUPTCY—RIGHT OF RESCISSION BY SELLER SHORTLY BEFORE ADJUDICATION.—In Jones v. Wm. Hobble Gro. Co., 246 Fed. 431, decided by Fifth Circuit Court of Appeals, it was held that as by Alabama law there is no subordination of the right of a defrauded creditor of personality to rescind a sale and reclaim property subject to any lien of other creditors of a fraudulent purchaser, such a seller could rescind and recover the personality sold from the purchaser's trustee in bankruptcy.

This rule was laid down in a prior circuit court of appeals case in re Siegel, 226 Fed. 1023, under Bankruptcy Act of § 47a (2), which provides that: "Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." In the instant case the Fifth Circuit Court of Appeals applies a rule of general law and decides that the bankruptcy statute intends in no way to interfere with its operation, except as the law of a particular jurisdiction, in which a bankruptcy court is sitting, may not regard the application of such general law. That the Bankruptcy Act is subject to administration according to local law is exemplified in instances of exemptions under state statute and in provisions as to record of mortgages, must be admitted. These things do not interfere with the general uniformity aimed at by bankruptcy law.

LIABILITY OF VENDOR OF IMPURE FOOD TO INJURED CONSUMERS.

There is an old English case which asserts that "if a man sells victuals which is corrupt without warranty, an action lies, because it is against the commonwealth."¹ It is clear, from this case, that if a man sells "victuals" with a warranty he unquestionably would be liable on his warranty, if the product sold were "corrupt."

This case blazed the way in actions by purchasers of deleterious food against their vendors when they have suffered a personal injury by eating the food purchased. The liability is placed upon two grounds, *viz*: (1) Breach of a legal duty, imperiling the lives of others. (2) Breach of warranty, either express or implied, concerning the fitness of the food sold for consumption. A third ground of liability has crept into the cases resting upon the ground of negligence.

In a rather early case in Massachusetts it was said that the liability does not rest so much upon an implied contract as upon a violated or neglected duty voluntarily assumed, and therefore it was not necessary to aver in the complaint that the vendor defendant knew of the injurious quality of the goods.² This rule has been followed in Illinois,³ and it has had its influence elsewhere.

"A dealer who sells goods for consumption," said the Supreme Court of Michigan, "impliedly warrants that it is fit for the purpose for which it is sold. If, in addition to this implied warranty, it is found that he was negligent in selling meats that are dangerous to those who eat them, he would be liable for the consequence of his act if he knew it to be dangerous, or by

proper care on his part, could have known its condition."⁴

Then it has been said that there is a warranty of fitness implied from the payment of a sound price;⁵ and it is no doubt true that the purchaser of food relies upon the supposed skill of the seller.⁶ Thus where a baker sold bread at a discount to a peddler for sale, not as a wholesale dealer, but as a mere middleman, and acting as agent in his employment, it was held that he impliedly warranted the wholesomeness of the bread;⁷ and a like holding was made where meats were purchased from a dealer and manufacturer without an opportunity for inspection, and packed by a process un-

(4) *Craft v. Parker, Webb & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; *Hover v. Peters*, 18 Mich. 51; *Sinclair v. Hathaway*, 57 Mich. 60, 23 N. W. 459, 58 Am. Dec. 327; *Copas v. Anglo-American Prov. Co.*, 73 Mich. 541, 41 N. W. 690; *Flessler v. Carstens Pkg. Co. (Wash.)*, 160 Pac. 14 (holding that scienter need not be alleged in the complaint in the absence of an allegation of warranty); *Flessler v. Carstens Pkg. Co.*, 81 Wash. 241, 142 Pac. 694; *Zielinski v. Potter (Mich.)*, 161 N. W. 851; *Rinaldi v. Mohican Co.*, 171 N. Y. App. Div. 814, 157 N. Y. Supp. 561; *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931; *Doyle v. Fuerst*, 129 La. 838, 56 So. 906.

Touching the question of an implied warranty, see *Winsor v. Leonard*, 18 Pick. 61; *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440; *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Burch v. Spencer*, 15 Hun. 504; *Devine v. McCormick*, 50 Barb. 116; *Hyland v. Sherman*, 2 E. D. Smith 234; *Hart v. Wright*, 17 Wend. 267; *Hoe v. Sanborn*, 21 N. Y. 552, 78 Am. Dec. 163; *Moses v. Mead*, 1 Dem. 378, 43 Am. Dec. 673; *Van Bracklin v. Fonda*, 12 Johns. 468, 7 Am. Dec. 339; *Humphreys v. Comline*, 8 Blackf. 516; *Williams v. Slaughter*, 3 Wis. 347; *Gettys v. Rountree*, 2 Finney 379, 2 Chand. (Wis.) 28, 54 Am. Dec. 138; *Moon v. McKinley*, 5 Cal. 471; *Jones v. Murray*, 3 T. B. Mon. 83; *Osgood v. Lewis*, 2 Har. & G. 495, 18 Am. Dec. 317; *McNaughton v. Joy*, 1 W. N. C. (Pa.) 470; *Ryder v. Neitge*, 21 Minn. 70; *Leukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429; *Goad v. Johnson*, 6 Heisk 340; *Beer v. Walker*, 46 L. J. C. P. 677; *Emmerton v. Mathews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. (N. S.) 261; *Clarke v. Stancliffe*, 7 Exch. 439; *Burnby v. Rollit*, 16 Mee. & W. 644.

(5) *Van Bracklin v. Fonda*, 12 Johns 468, 7 Am. Dec. 339; *Hart v. Wright*, 17 Wend. 267; *Gray v. Cox*, 6 Dowl. & R. 200, 8 Dowl. & R. 220.

(6) *French v. Vining*, 202 Mass. 132, 3 Am. Rep. 440.

(7) *Sinclair v. Hathaway*, 57 Mich. 607, 58 Am. Rep. 827.

(1) *Roswell v. Vaughn*, Cro. J. 196.
(2) *Bishop v. Weber*, 139 Mass. 418, 52 Am. Rep. 715.

(3) *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210, reversing 53 Ill. App. 382.

known to the purchaser.⁸ And it is said that a canner of goods impliedly warrants them in its sale, which warranty is available to anyone damaged by reason of eating them.⁹

The cases following the line of liability of implied warranty do not require proof to show that the vendor knew the food was impure, or might have known it by diligent inquiry. If the "purchaser had a right to rely upon an implied warranty that the meat was sound and wholesome, it was not incumbent upon him either to plead or prove that appellant actually knew that the meat was unwholesome. He was only required to plead and prove such facts to the satisfaction of the jury, from which the law raises the implied warranty. *Scienter* need not be pleaded; and it follows that it need not be proven."¹⁰ That is especially true where a retailer is held liable on a sale of canned goods he has purchased in the cans from the manufacturers, for in the very nature of things, to ascertain if the particular can contained a pure product, which produced the injury, by opening it, would destroy its salability.¹¹

(8) *Copas v. Anglo-American Prov. Co.*, 73 Mich. 541, 41 N. W. 690; *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923.

(9) *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213; *Freeman v. Schultz Bread Co.*, 163 N. Y. Supp. 396 (nail in loaf of bread); *contra*, *Jacobs v. Childs Co.* 166 N. Y. Supp. 798 (nail in loaf of bread).

(10) *Flessher v. Carstens Pkg. Co.*, 93 Wash. 48, 160 Pac. 14.

(11) *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620; *Chapman v. Roggenkamp*, 182 Ill. App. 117. In a few cases it has been denied that anything can be inferred from a sale of provisions which may not be inferred from a like purpose in other sales: *Wright v. Hart*, 18 Wend. 464; *Emerson v. Brigham*, 10 Mass. 197; see also *Windsor v. Lombard*, 18 Pick. 57.

In a Massachusetts case, an action against the manufacturer, the question of his liability was left to the jury, and it was said that he was bound to use every reasonable precaution to supply an article which would not be deleterious to the consumer's health, apart from any expectation of pecuniary profit or apprehension of loss. *Wilson v. J. G. & B. S. Ferguson Co.*, 214 Mass. 265, 101 N. E. 381.

Where a manufacturer advertised a mixture as healthful and nutritious, and sold it to a

"In ordinary sale of goods the rule of *caveat emptor* applies unless the purchaser exacts of the vendor a warranty. Where, however, articles of food are purchased from a retail dealer for immediate consumption, the consequences resulting from the purchase of an unsound article may be so serious and may prove so disastrous to the health and life of the consumer that the public safety demands that there should be an implied warranty on the part of the vendor that the article sold is sound and fit for the use for which it was purchased. It may be said that the rule is a harsh one; but, as a general rule, in the sale of provi-

wholesaler, who in turn sold it to a druggist, and he to the consumer, it was held whether or not the manufacturer was liable to the consumer on account of the mixture's poisonous character, was a question for the jury. *Anheuser Busch Brewing Co. v. Roberts*, 211 Mass. 449, 98 N. E. 95.

Where a wife went to a meat dealer and purchased meat for her husband, to be used in their home, it was held that she, because of her injuries sustained on account of the meat's deleteriousness, could not recover on an implied warranty because none was given her, and that she could not recover at all except upon proof of the negligence laid in the declarations; and mere proof of a sale and the harmful result from eating the meat did not make out a case of negligence. *Gearing v. Beakson*, 223 Mass. 257, 111 N. E. 785.

If one buying meat at a shop relies on the skill and judgment of the dealer in selecting the meat, and the fact is made known to the dealer that his knowledge and skill are relied upon to supply wholesome food, such dealer is liable to the buyer for damages resulting from his supplying unwholesome food. *Gearing v. Berkson*, *supra*, following *Farrell v. Manhattan Market Co.*, 198 Mass. 271, 84 N. E. 481.

The rule of implied warranty does not apply where the purchaser is also a dealer, and is in as good a position to judge concerning the quality as the vendor. In such an instance the rule of *caveat emptor* applies. *Zielinski v. Porter* (Mich.) 161 N. W. 851; *Howard v. Emerson*, 110 Mass. 320, 14 Am. Rep. 608; *Hart v. Wright*, 17 Wend. 267; *Wright v. Hart*, 18 Wend. 449; *Moses v. Mead*, 1 Denio 378, 43 Dec. 673; *Giroux v. Stedman*, 145 Mass. 439, 14 N. E. 538, 1 Am. St. 472; *Humphrey v. Comline*, 8 Blackf. 516; *McRoy v. Wright*, 25 Ind. 22; *Emerton v. Mathews*, 7 H. & N. 586; *Smith v. Baker*, 40 L. T. (N. S.) 261; *Jones v. Murray*, 4 B. Mon. 83; *Goad v. Johnson*, 6 Heisk. 340; *Burnby v. Rollit*, 16 Mees. & W. 644; *Goldrich v. Ryan*, 3 E. D. Smith 324; *Needham v. Dial*, 4 Tex. Civ. App. 141, 23 S. W. 240.

But in a contract to purchase all the liquor to be consumed on the vendee's premises, there is an implied warranty on the part of the vendor that it shall be fit to drink. *Clarke v. Stancliffe*, 7 Exch. 439.

sions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than the purchaser, to assume the risk."¹²

Manufacturer's Liability to Ultimate Consumer.—In modern times millions of tons of food are annually packed in the United States in hermetically sealed cans and put upon the market; and millions of tons of food in cartons are likewise offered for sale. The packer's intention is that the food packages and cans shall be sold to the consumer in the same can or package, and in the exact condition in which they leave the factory. The retailer sells the food to the ultimate consumer, innocent of any impurity that may be in it.

When the ultimate consumer sued a canner of the meat, which was impure and poisonous, the two living nearly a thousand miles apart, and the canned product having passed through the hands of jobbers, wholesalers and a retailer to the plaintiff, it was held that the canner was liable to him, regardless of the fact that there was no contract between them. "The fact that the defendant was the manufacturer," said the court, "presumably having knowledge or opportunity for knowledge, of the contents of the cans and of the process of manufacture; that it put the goods upon the market for sale by dealers to consumers under circumstances such that neither dealer nor consumer had opportunity for knowledge of contents; the fact that the goods were thus manufactured and marketed under circumstances that imported a representation to intending purchaser that they were fit for food and beneficial to the human body; that in the ordinary course of business there was a probability (it being, indeed, the very purpose of the de-

(12) *Wiedeman v. Keller*, 171 Ill. 93, 49 N. E. 210, reversing 58 Ill. App. 382. The court added, "Moreover, we have a statute which makes it a crime for any person to sell or offer to sell, or keep for sale, flesh of any diseased animal." The case involved a sale of canned fish. See also *Chapman v. Roggenkamp*, 182 Ill. App. 117. The above passage is quoted in *Sloan v. F. W. Woolworth*, 193 Ill. App. 620.

fendant) that the goods should be purchased and used by parties purchasing in reliance upon its representations, and that defendant negligently prepared the food so that it was unwholesome and unfit to be eaten, and poisonous to the human body, whereby the plaintiff was injured, makes a case that renders the defendant liable for the damages sustained by the plaintiff thereby."¹³ A number of cases reach the same result.¹⁴

It has also been held that the retailer is liable to his immediate vendee for impure food in a sealed can, even though he had no knowledge of its impurity.¹⁵ A purchaser of a loaf of bread that had a nail in it, bit upon the nail and was injured, and it was held that he could recover damages of the baker, though he had bought the loaf from a retailer¹⁶ So when a meat dealer put up

(13) *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923. The court reviews many cases, only a few of which concern sales of food.

(14) *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455 (sale of drugs); *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. 324; *Ketter v. Armour & Co.*, 200 Fed. 322 (trichina in pork); *Haley v. Swift & Co.*, 152 Wis. 575, 140 N. W. 232; *Parks v. G. C. Yost Pit Co.*, 93 Kan. 334, 144 Pac. 202, 1 L. R. A. 1915 C 179; *Wilson v. J. G. & B. S. Ferguson Co.* 214 Mass. 265, 101 N. E. 381; *Mazetti v. Armour & Co.*, 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213 (The consumer is not bound to first sue the retailer and make an effort to collect from him). *Boyd v. Coca-Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80 (dead mouse in bottle); *Watson v. Augusta Brewing Co.*, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. 157; *Anheuser-Busch Brewing Assn. v. Roberts*, 211 Mass. 449, 98 N. E. 95; *Hollingsworth v. Midwest Serum Co. (Iowa)*, 162 N. W. 620 (hog anti-cholera serum); *Ward v. Morehead City Sea Food Co.*, 171 N. C. 33, 87 S. E. 983; *Catani v. Swift & Co.*, 251 Pa. 52, 95 Atl. 931; *French v. DeMoss (Tex. Civ. App.)* 180 S. W. 1105 (poisonous antiseptic tablets instead of acetanilid tablets); *Richards v. H. K. Mulford Co.*, 236 Fed. 677, 150 C. C. A. 9.

(15) *Sloan v. F. W. Woolworth Co.*, 193 Ill. App. 620 (see later in the decision of the liability of a restaurateur); *Rinaldi v. Mohican*, 171 App. Div. 814, 157 N. Y. Supp. 561; *contra*, *Julian v. Laubenberger*, 16 Misc. Rep. 646, 38 N. Y. Supp. 1052.

(16) *Freeman v. Schultz Bread Co.*, 163 N. Y. Supp. 396. In the case of a guest in a restaurant biting on a nail in a loaf of bread, a recovery against the keeper of the restaurant was denied. *Jacobs v. Childs Co.*, 166 N. Y. Supp. 798.

in packages prepared mince meat, some of which the ultimate purchaser ate and died from the poisonous effects, it was held that the manufacturer was liable to the administrator of the deceased.¹⁷

And when the child of the purchaser of sausages made of putrid meat ate it, to its injury, it was held that it had a cause of action against the manufacturer.¹⁸

The fact that the product sold had been out of the manufacturer's possession for several months will not preclude, as a matter of law, a recovery. Where a manufacturer has advertised his article to be healthful and harmless, a buyer of it, injured in its use, may recover in tort because of his injuries.¹⁹

Canned Goods.—Let us return to the subject of canned food. As the intent of a canner of food is that it shall be sold to the consumer unopened, the courts have pretty generally held that the canner is liable to the consumer who is injured by its deleterious condition, regardless of how many hands it has passed through from him to such consumer. The canner is presumed to have knowledge, or an opportunity to gain knowledge, of the contents of the cans and of the product manufactured; and it is not necessary to either aver or prove that he had knowledge of their deleterious condition, or that they are unfit for consumption

or food. The very act of canning the food and putting it on the market imports a representation to intending purchasers that the food is fit to eat and is beneficial to the human body. The fact that there is no immediate contract between the canner and consumer is not necessary to render the canner liable. The canner is under a duty to the consumer to exercise care that the goods which he puts up and sells to the wholesaler or retailer are wholesome and fit for food, and not tainted with poison.²⁰

Ultimate Consumer—Summary of Cases.—“Practically all the modern cases are to the effect that the ultimate consumer of foods, medicine, or beverages, may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles. This is certainly true where the articles are sold in sealed packages and are not subject to inspection. Some of the cases place the liability on the grounds heretofore stated [*viz*: breach of legal duty where the act performed, if not done with care and skill, will imperil the lives of others]. Others place it on pure food statutes. Others say there is an implied warranty when the goods are dispensed in original packages, which is available to all damaged by their use; and another case says the liability rests upon the demands of social justice.”²¹

Restaurant Keepers.—In the case of a restaurant keeper who regales his customers with poisonous food, to their injury, it has been held that the guests may recover without averring or proving that the restaura-

(17) *Solomon v. Libby, McNeill & Libby*, 219 Ill. 421, 76 N. E. 573 (the averment was that the defendant negligently and improperly prepared and manufactured the mince meat, whereby it became unfit for food and was poisonous. There was no averment of a scienter, the declaration counting upon the negligence alone. It was held that it set forth a good cause of action). *Croft v. Parker, W. & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139 (Spoiled bacon; the defendant was the vendor to the retailer, not the manufacturer; and he was held liable; nothing was said about the manufacturer).

A manufacturer of products for pies must use every reasonable precaution to supply an article which will not be deleterious to the consumer's health, apart from any expectation of pecuniary profit or apprehension of loss. *Wilson v. J. G. & B. S. Ferguson Co.*, 214 Mass. 265, 101 N. E. 381.

(18) *Haley v. Swift & Co.*, 152 Wis. 570, 140 N. W. 292.

(19) *Anheuser-Busch Brewing Assn. v. Roberts*, 211 Mass. 449, 98 N. E. 95.

(20) *Tomlinson v. Armour & Co.*, 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Salmon v. Libby, McNeill & Libby*, 219 Ill. 421, 76 N. E. 573, reversing 114 Ill. App. 258; *Craft v. Parker W. & Co.*, 96 Mich. 245, 55 N. W. 812, 21 L. R. A. 139; *Jackson Coca-Cola Bottling Co. v. Chapman* (Miss.), 64 So. 791; *Malone v. Jones*, 91 Kan. 815, 139 Pac. 387, affirmed on rehearing 92 Kan. 308, 142 Pac. 274, L. R. A. 1915A 331; *Parks v. G. C. Yost P. Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C 179; contra, *Nelson v. Armour & Co.*, 76 Ark. 352, 90 S. W. 288, 6 A. & E. Ann. Cas. 237.

(21) *Boyd v. Coca-Cola Bottling Works*, 132 Tenn. 23, 177 S. W. 80.

teur was guilty of negligence in the purchase or preparation of the food. "The principle which governs this case," said the Louisiana Supreme Court, "that everyone ought to know the quality, good or bad, of the things which he fabricates in the exercise of that craft or business of which he makes public profession, and that lack of such knowledge is imputed to him as a fault, which makes him liable to the purchasers of his fabrications for the damages resulting from the vices or defects thereof which he did not make known to them and which they are ignorant of. It is needless to consider what qualifications or restrictions this principle may suffer in particular cases. Suffice it to say that it has full play in the present case, where chocolate and cakes were sold at a public eating place, to be consumed on the premises. It is easily possible for the keeper of such a place to know in all cases whether the eggs, milk and butter he sells, or the articles of food he has made out of them, are food fit for human consumption. He is therefore at fault if those articles prove to be vitiated and deleterious."²²

In Illinois the liability of a restaurant keeper for a sale of deleterious food, resulting in an injury to his customer eating in the restaurant, is placed upon the ground of negligence solely; and mere proof of the purchase and sickness from eating the food purchased is not enough to establish the restaurateur's liability. "If a person keeping a public restaurant," said the Supreme Court, "fails to exercise ordinary care in furnishing food to his patrons, and damages result, he would be liable, if his business be conducted in a careless or negligent manner, and through such negligent conduct a patron is injured. But, where an action is brought to recover damages, the burden is upon the person bringing the action to es-

(22) Doyle v. Fuerst & Kramer, 129 La. 838, 56 So. 480, 40 L. R. A. (N. S.) 480; Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; see also Gordon v. McHardy (1903) F. 210, 41 Scot. L. R. 129, 11 Scot. L. T. 490.

tablish carelessness or negligence. Plaintiff claims that having proved that she ate the oyster broth at the defendant's restaurant, and in consequence became sick, her case is made out, or at least the burden of proof is shifted on the defendants. If this rule were adopted the plaintiff would be relieved from proving the most important element of her declaration, the negligence of the defendant, which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct in principle, nor has it been sustained, so far as we are advised, by any reputable authority."²³

In Connecticut it was sought to hold a restaurant keeper liable for poisonous food supplied his guests, upon the ground of an implied warranty of the quality of the food furnished for immediate consumption, but the court held that there was no liability, upon the ground that the transaction did not constitute a sale, but the rendition of a service. "The customer does not become the owner of the food set before him," said the court, "or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat, and that is all. The uneaten food is not his.²⁴ He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but then he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions.²⁵ The true essence of

(23) Shaffer v. Willoughby, 166 Ill. 518, 45 N. E. 253, 54 Am. St. 483, 34 L. R. A. 464; Crocker v. Baltimore Dairy Lunch Co., 214 Mass. 177, 100 N. E. 1078, Ann. Cas. 1914B 884; Pantale v. West, 7 Ala. App. 599, 61 So. 42.

(24) How about the food ordered a la carte at so much a piece or portion? Can not he carry it away even if it be not in his stomach?

(25) In an a la carte restaurant may he not feed his child sitting by his side with that part of his purchase he does not want or is willing to make a sacrifice of that his child's hunger may be satisfied?

the transaction is service in the satisfaction of a human need or desire—ministering to a bodily want.²⁶ A necessary incident of this service or ministry is the consumption of the food requested. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass;²⁷ after consumption there remains nothing to become the subject of title. What the guest pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for is clearly more than the price of food as such. It includes all that enters into conception of service, and what is no small factor of direct personal service. It does not contemplate the transfer of the present property in the food supplied as a factor in the service rendered."²⁸

And where a restaurant keeper furnished canned food to his guest, taken immediately from the can, and he purchased the food from a reputable dealer, and it bore a well-known brand, and was of the highest grade, and was guaranteed under the federal Pure Food and Drugs Act, and was prepared for immediate service with due care by an experienced cook, and there was nothing to indicate that it was unfit for food, it was held that he was not liable. In this case all inference of negligence was really rebutted, due care being shown.²⁹

In the same line are other cases. Thus it has been held that the owner of a cafe or restaurant is bound to use due care to see that the food served to his customers, at his place of business, is fit for human con-

(26) Does any one for an instant think the restaurant keeper is actuated by such an altruistic idea?

(27) Is this true of an a la carte order? Does not the guest regard the food he has ordered as his?

(28) *Merrill v. Hodson*, 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B 481.

(29) *Bigelow v. Maine R. Co.*, 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627; *Valeri v. Pullman Co.*, 218 Fed. 519 (dining car); *Travis v. Louisville & N. R. Co.* (Ala.), 62 So. 851 (dining car).

sumption and may be eaten without causing sickness or endangering life by reason of its condition; and for negligence in failing to observe this duty to the public or his patrons, he is liable.³⁰ He must exercise the same degree of care in selecting and preparing food which a reasonably prudent man, skilled in the art of selecting and preparing food for human consumption, would be expected to exercise in preparing food for his own private table.³¹ If the keeper of the restaurant is not guilty of negligence in making his purchase of food, he is not liable.³² Thus, where a well-known Eastern restaurant company served a guest with bread it had purchased from a reputable baker, and a guest, when eating of it bit upon nail concealed in it, to his injury, it was held that the company was not liable;³³ though in such an instance the baker is liable.³⁴

A son arranged with his parents to board his employes, and an employe was served by the son's mother with tainted meat purchased by the father. It was held that all three were liable.³⁵

Burden to Show Negligence.—Where the liability of the vendor is placed solely on the grounds of negligence, then the burden is on the plaintiff to show sufficient negligence to entitle him to a recovery, and that the impure food injured him.³⁶

The question of negligence is one for the jury, even though the vendor show he pur-

(30) *Greenwood Cafe v. Lovinggood* (Ala.), 72 So. 854; *Pantaze v. West*, 7 Ala. App. 599, 61 So. 42; *Stringfellow v. Greenwald*, 109 La. 187, 33 So. 190.

(31) *Travis v. Louisville & N. R. R. Co.* (Ala.), 62 So. 851 (see this case for instructions to the jury).

(32) *Crocker v. Baltimore Dairy Lunch Co.*, 214 Mass. 177, 100 N. E. 1078.

(33) *Jacobs v. Childs Co.*, 166 N. Y. Supp. 798.

(34) *Freeman v. Schultz Bread Co.*, 163 N. Y. Supp. 396.

(35) *Malone v. Jones*, 92 Kan. 708, 142 Pac. 274; on rehearing, 139 Pac. 1199, affirming 91 Kan. 815, 139 Pac. 387, L. R. A. 1915 A 331.

(36) *Travis v. Louisville & N. R. Co.* (Ala.), 62 So. 851.

chased the food from a reputable dealer.³⁷ What is sufficient evidence of negligence is a question finding a different answer in different courts. In one case evidence that a nail was concealed in bread was held sufficient to render the baker liable;³⁸ but not so when the action was against the restaurant keeper brought by his guest.³⁹ The defendant may show his practice in judging and inspecting food; but only purchases reasonably near the time of injury can be shown.⁴⁰ The recovery must be upon the particular sale alleged, and not upon other sales on other days.⁴¹

Contributory Negligence.—If the purchaser be guilty of negligence materially contributing to his injury, he cannot recover damages, because of his use of the impure food.⁴² But a purchaser is not bound to examine a sealed bottle or can to see if there

(37) Pantaze v. West, 7 Ala. App. 599, 61 So. 42.

(38) Freeman v. Schultz Bread Co., 163 N. J. Supp. 396.

(39) Jacobs v. Childs Co., 166 N. Y. Supp: the court saying the doctrine of *res ipsa loquitur* did not apply; see also Shaffer v. Willoughby, 163 Ill. 528, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. 486.

(40) Pantaze v. West, *supra*.

(41) Askan v. Platt, 85 Conn. 448, 83 Atl. 529. The plaintiff may testify that he purchased food of the defendant and ate it, and may also testify to his symptoms after eating it, but he may not say the food caused his illness—that is a question for the jury. Travis v. Louisville & N. R. Co., *supra*.

Sale of food in violation of a statute is sound evidence of negligence. Mazetti v. Armour & Co., 75 Wash. 622, 135 Pac. 638, 48 L. R. A. (N. S.) 213.

A dealer is not liable under the Federal statute (34 U. S. Stat. at Large, 771) "when he can establish a guaranty signed by the wholesaler, manufacturer or other party residing in the United States, from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of the Act, designating it." It has been held that the statute relieves the retailer from liability to his vendee. Trafton v. Davis, 110 Me. 318, 86 Atl. 179.

(42) Gorman v. Gammill Drug Co., 185 Ala. 653, 64 So. 350. In this case a druggist sold Epsom salts to a dairyman for common salt. The purchaser knew the difference in the two salts and was able to distinguish between them. He fed the purchased product to his cow and she died. A recovery was denied.

is a deleterious substance in it.⁴³ Such was held to be the case in a sale of a sealed bottle of coca-cola having a dead mouse in it, which the purchaser swallowed in drinking the contents of the bottle.⁴⁴ And it was held in an Illinois case that want of due care on the part of the plaintiff was not shown on his part as a matter of law by the fact that she took several bites of the canned fish she had bought after noticing that it was tasteless and that the tomato sauce in which it came was not the right color.⁴⁵ The failure to label a food product as a statute requires does not relieve the purchaser from the excuse of using reasonable care and caution in its use.⁴⁶

Food for Stock.—The rules we have been discussing are applicable to sale of food for cattle, horses and hogs. Thus where a poisonous substance had been spilled upon hay, and the owner believing he had separated the contaminated from the uncontaminated portion, sold the remainder to a stock owner, who fed it to his cattle and horses, to his hurt, the vendor was held liable.⁴⁷ The seller of bran, knowing that the buyer desires to use it for feed for his stock and wants wheat bran, is liable for damages caused by the delivery of mixed food.⁴⁸ Where a contract for the sale of corn chops was evidenced by a written order for chops, requiring the chops to be "delivered guaranteed," it was held that there was a guaranty of merchantable quality on delivery.⁴⁹ But in a Massachusetts case it

(43) Boyd v. Coca-Cola Bottling Co., 132 Tenn. 23, 177 S. W. 80.

(44) Criger v. Coca-Cola Bottling Co., 132 Tenn. 545, 179 S. W. 155, L. R. A. 1915B 877.

(45) Sloan v. F. W. Woolworth Co., 193 Ill. App. 620. The question of contributory negligence was a question for the jury.

(46) Aukenbrandt v. Joachim, 173 Ill. App. 158.

(47) French v. Vining, 102 Mass. 132, 3 Am. Rep. 440.

(48) Houk v. Berg, (Tex. Civ. App.), 105 S. W. 1176; see Pratt Food Co. v. Bird, 148 Mich. 631, 112 N. W. 701, 14 Detroit Legal News 304, 118 Am. St. 601.

(49) Kimball-Fowler Cereal Co. v. Chapman & Dewey Lumber Co., 125 Mo. App. 326, 102 S. W. 625.

was held that in the absence of negligence on his part a miller was not liable as upon an implied warranty for injury to cattle from bran bought from him into which pieces of metal had accidentally fallen.⁵⁰

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(50) Leukens v. Freund, 27 Kan. 664, 41 Am. Rep. 429. The court thought it would be different with human food.

SALES—SHIPMENT ON NOTIFY ORDER.

J. L. PRICE BROKERAGE CO. v. CHICAGO
B. & Q. R. Co. et al.

Kansas City Court of Appeals. Missouri.
Dec. 3, 1917. Rehearing Denied Dec. 31,
1917.

199 S. W. 732.

Where defendant by telegraph offered potatoes at a price, but the telegraph company made a mistake as to price, and plaintiff accepted the offer at the mistaken price, and the potatoes were shipped with bill of lading and sight draft attached, and plaintiff made tender of the amount due at the telegraphed price, the right to delivery to plaintiff was complete, and replevin would lie; the telegraph company being defendant's agent.

TRIMBLE, J. This was a replevin suit brought by the plaintiff brokerage company at St. Joseph, Mo., to obtain possession of a carload of potatoes shipped from Wyoming to St. Joseph, Mo., by the defendant National Bank of Powell, Wyo. There was a finding and judgment for plaintiff, from which the defendant bank appealed.

A sale of the potatoes was made by an exchange of telegrams between the Wyoming bank and the plaintiff. The bank first telegraphed an offer to sell on certain terms. As delivered by the bank to the telegraph company, the telegram read:

"Can furnish one car clean white potatoes at one thirty-five per hundred f.o.b. Powell."

But, through a mistake in the transmission of the telegram, when delivered to the plaintiff, it read:

"Can furnish one car clean white potatoes at once thirty five per hundred f. o. b. Powell."

Plaintiff immediately telegraphed:

"Wire just received. We accept car. Ship quick as possible."

The Wyoming bank shipped the potatoes to the plaintiff, but sent the bill of lading to a bank at St. Joseph, with draft attached for the amount of the potatoes at \$1.35 per hundred. When the draft was presented for an amount larger than the price plaintiff had agreed to pay, it telegraphed the Wyoming bank to direct the St. Joseph bank to reduce draft to amount due on the basis of 35 cents per hundred. The Wyoming bank replied, saying its price was \$1.35, and notified the St. Joseph bank to hold bill of lading till full amount of draft was paid. Plaintiff thereupon tendered the amount due on a 35-cent basis both to the St. Joseph bank and to the carrier, but, not being able to obtain possession of the shipment, brought suit to replevin it.

Appellant, the Wyoming bank, contends that plaintiff did not have the right to possession until the title to the shipment passed by delivery, that the bill of lading was to shipper's order, and title was on that account retained in the seller until delivery was made on payment of the price it demanded, and, as this was never done, no right of possession was ever acquired by the plaintiff purchaser, and hence replevin would not lie.

The bill of lading was not offered in evidence, and hence there is no direct showing as to what its terms were. The only evidence as to the matter was given by the appellant's cashier, who testified:

"We shipped a carload of potatoes to the Price Brokerage Company of St. Joseph, Missouri, and we sent draft with bill of lading attached to the Bank of Buchanan County, Missouri."

It might be claimed that from the references made to it by appellant's counsel throughout the trial not disputed or contested in any way, and from the course pursued by the parties in relation to the shipment, presumably the bill of lading was to shipper's order. But, conceding for the sake of argument, that it was, still, does this help appellant?

When it, in the first place, offered by telegram to sell potatoes to the plaintiff, it made the telegraph company its agent to convey that offer, and, for any mistake the agent made in doing so, the appellant must suffer the loss incurred. The contract was made at 35 cents per hundred. It called for delivery on board cars at Powell, Wyo. The seller appropriated the potatoes to the contract, and placing them on board the cars, shipped them to St. Joseph. In shipping the potatoes and directing the bill of lading to be turned over upon payment for

them, the seller manifestly intended that plaintiffs should have possession of the potatoes, the only thing remaining to be done was the payment of the contract price. It is true the seller thought the contract price was \$1.35, but, unfortunately for the seller, that was its mistake, so far as the purchaser was concerned. As the real contract stood, there was nothing farther to be done except for the purchaser to pay the agreed price, and when said vendee made a tender thereof, it was the same as if the agreed price had been paid. When the tender was made, the title passed then, even if, on account of the terms of the bill of lading, the title did not pass when the potatoes were delivered on board the cars at Powell. When the tender of the price according to contract was made, the vendor had no right to withhold possession. The situation was the same as if the vendee, plaintiff, had gone out to Powell, Wyo., and said to the vendor bank:

"Here is a contract made with your agent for this car of potatoes at 35 cents per hundred and here is the amount of money due at that price."

The bank would have no right to say:

"I have the potatoes here in a car for you, but my agent made a mistake in contracting with you at 35 cents, and therefore I will not turn them over to you until you pay me \$1.35."

Under such circumstances, a tender of the contract price on the part of the vendee would make its right of possession complete, and replevin would lie. *Ilgenfritz v. Missouri Pacific R. Co.*, 169 Mo. App. 652, 155 S. W. 854; *Roaring Fork Potato Growers v. Clemons Produce Co.*, 193 Mo. App. 653, 656, 187 S. W. 617; *Estis v. Harnden*, 153 Mo. App. 381, 134 S. W. 43; *Hamilton v. Clark*, 25 Mo. App. 428; *Kuhler v. Tobin*, 61 Mo. App. 576.

The judgment is affirmed. All concur.

NOTE.—Vesting of Title in Consignee by Delivery to Common Carrier.—The instant case treats the shipment involved therein as being on general consignment and ignores the fact as not being material, that it was sent to shipper's order. But ignoring this fact, if error, makes the ruling inconsistent with a prior ruling by St. Louis Court of Appeals in *Carder v. Atchison, T. & S. F. Ry. Co.*, 170 Mo. App. 698, 153 S. W. 517. That case says that: "It is elementary, that, where the bill of lading shows a general consignment, and not one to shipper's order or with other reservation, it *prima facie* vests the legal title to the goods in the consignee and the latter is presumed to be the owner of the property covered by the bill of lading." After citing several Missouri cases to this proposition it cites also *Patzer v. Burlington C. R. & N. R. Co.*, 64 Minn. 245, 58 Am. St. Rep. 530, which shows a shipment to consignor's

order and a pledge to another of the bill of lading. At shipper's request the goods were delivered to another at an intermediate point without surrender of the bill of lading. The carrier was held liable to the pledgee for failure to deliver goods at their original destination and is estopped to show the intermediate delivery at shipper's request. In support of this ruling are cited *The Thames*, 14 Wall 98; *North v. Merchants, etc. Transp. Co.*, 133 Mass. 154; *Furman v. U. P. R. Co.*, 106 N. Y., 579; *Pa. R. R. Co. v. Stern*, 119 Pa. St. 24, 4 Am. St. Rep. 626; *Boatmen's Sav. Bk. v. Western & A. R. Co.*, 81 Ga. 221, and numerous other cases. Indeed it seems undoubted law, recognized everywhere and in everyday business transactions that the bill of lading is the symbol of title and conclusive between carrier and the lawful holder of the bill of lading.

But independent of that the title is vested even in general consignment in the consignee not in a conclusive way, but only presumptively. A short cut remedy is not to be allowed against the carrier by an alleged consignee, so as to prejudice the rights of the consignor in the goods shipped. The consignor is entitled to be heard.

This action is not like that of *Coleman v. N. Y. H. & H. R. Co.*, 215 Mass. 45, 102 N. E. 92. This was an action against the carrier by the consignee in actual possession of the bill of lading. Though this possession was held to be evidence of his right to immediate possession, yet the carrier was held entitled to show, if he could, that the vendor had exercised a right of stoppage *in transitu*. There being judgment for the plaintiff, the cause was remanded to ascertain whether the right, claimed to have been exercised, had been reasonably claimed by the seller, and if alleged insolvency of the consignee existed so that the right of stoppage could be exercised. In the instant case the plaintiff did not have the evidence which tended to show his right to sue the carrier.

In *St. L. & S. F. R. Co. v. Allen*, Okla., 120 Pac. 1090, 52 L. R. A. (N. S.) 309, it was held that where a shipment was made on shipper's order, and bill of lading with draft attached was forwarded, the party to be notified, though paying the draft and coming into possession of the bill of lading, had no right to recover of carrier for a shortage arising before the goods reached their destination, because the title still was in the shipper. While this ruling is debatable, on the theory of the title by relation going back, yet the principle that no title passes to consignee until he comes lawfully into possession of the bill of lading is declared.

In *Willman Merc. Co. v. Fussy*, 15 Mont., 511, 39 Pac. 738, 48 Am. St. Rep. 698, there was a shipment of apples on shipper's order and there was refusal to pay the draft attached to bill of lading. It was said there was no passing of title. It was said that: "To get at the intention of the parties to such commercial transactions, the bills of lading are resorted to. If the vendor, when shipping, takes the bill of lading in his own name, this fact, when not rebutted by evidence to the contrary, is very strong proof of the intention of the vendor to reserve title in

himself, and is almost decisive to prove the vendor's intention to retain the *jus disponendi* of the property and to prevent the delivery of the same to the vendee."

In *Dows v. National Exch. Bank*, 91 U. S. 618, 23 L. Ed. 214, it was said that: "A bill of lading taken, deliverable to the shipper's own order, is inconsistent with an intention to pass the ownership of the cargo to the person on whose account it may have been purchased." * * * Where there is any evidence to rebut the effect of the bill, it becomes a question for the jury, whether the property has passed. But where there is no such evidence, there is no necessity of submitting to the jury the question as to whether there was a change of ownership."

But what seems particularly wrong, about this case is that notwithstanding the shipment, which amounted to a reservation of title, the court puts aside this question and adjudicates the case without the shipper having a chance to be heard and as to a contract which on its face appears inconceivable. In *Mummendorf v. Randall*, 19 Ind. App. 44, there was an error by seller's stenographer in quoting potatoes at 35 cents a bushel, when vendee was charged .55 cents. It was alleged that the buyer had reason to know this must have been an error. Plaintiff had judgment for 55 cents. How very much more was there reason to believe the vendee in the instant case knew he was not getting for 35 cents, that which was selling in open market for \$1.35?

C.

BOOK REVIEW.

BILLSON'S EQUITY IN ITS RELATION TO COMMON LAW.

Mr. William W. Billson, of the Minnesota bar, has written an excellent treatise under the above title.

Though the work appears under a title suggestive more of theory than of practical value, as things are measured in these days, it is far from being a mere philosophical discussion. The latter is predicated greatly on precedents in decision as applied to concrete cases, and both by the student and the practitioner the book will be read with interest and profit.

The author writes in lucid, informative style, and fortifies his propositions with the cases by the leading judges and text writers of English and American history.

The work is briefer than it otherwise might have been made, containing no unnecessary padding, what is said being packed into small compass, comprising less than 250 pages.

The work is presented in attractive style, in cloth cover, and comes from the Boston Book Company, Boston, 1917.

HUMOR OF THE LAW.

Mrs. Erwin was showing Selma, the new Swedish maid, "the ropes."

"This," said Mrs. Erwin, "is my son's room. He is in Yale."

"Ya?" Selma's face lit up with sympathetic understanding. "My brudder ban there too."

"Is that so? What year?"

"Ach, he ban got no year! He ban punch a man in the eye, und the yoodge say, 'You Axel, sixty days in yail!'"—Harpers.

The lawyer was drawing up old Furrow's will.

"I hereby bequeath all my property to my wife," dictated the son of the soil. "Got that?"

"Yes," continued the lawyer.

"On condition that she marries again within a year."

The legal light sat back puzzled.

"But why?"

"Because," was the reply, "I want somebody to be sorry I died!"

The partners who had never been well mated were having their dissolution of partnership quarrel.

"You've been playing the baby act," said one, "ever since we went into business together."

"You bet I have," said the other promptly. "I've been putting up my head against your cheek."—Strickland Gillilan.

Youth is no barrier to real trouble. Historical controversies are creeping into the public schools, since in the larger cities there is such an increasing attendance of various races.

The class in history had been called and the teacher was giving a review lesson.

"Who discovered America?" she asked, directing her gaze upon little Tommy Noyes. The lad grew deathly white and showed much agitation. The teacher, in much surprise, repeated the question.

"Oh, please, ma'am," he finally blurted out, "ask me somethin' else."

"Something else, Tommy? Why should I do that?"

"The guys in back here was talkin' about it yesterday. Timmy Flinn said it was discovered by an Irish saint, Gustaf said it was a sailor from Sweden, and Tony Guerra said it was Columbus, an' if you'd seen what happened you wouldn't ask a little fellow like me what's got no gang."

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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1. Adverse Possession—Color of Title.—If defendant became vested with title to realty under parol gift from her mother, or by adverse possession before execution of quitclaim deed to her by mother, in which defendant was named as trustee, mother was wholly without authority to bind defendant by any limitations upon title.—*Barber v. Wiemer*, Ia., 165 N. W. 440.

2.—Prescription.—Where father and mother to defeat slander suit deeded land to son with parol agreement on his part to reconvey one-half thereof to his brother, and grantee for 21 years claimed and held property as his own, adversely to all world, including his grantors, he could not be dispossessed.—*Maynard v. Maynard*, Ky., 199 S. W. 26.

3. Animals—Jury Question.—Where defendants, charged with killing cattle, had spoken about hunting "rabbits" in a way indicating that something else was meant, whether it had a meaning indicating guilt held for the jury.—*State v. Schyhart*, Mo., 199 S. W. 205.

4. Attorney and Client—Attorney's Lien.—Proceedings against estate in bankruptcy are special proceedings, within Code Civ. Proc., § 3334, defining special proceedings, to which an attorney's lien attaches to his client's cause of action.—*In re Flower*, N. Y., 167 N. Y. S. 778.

5.—Compensation.—Under Rev. St. 1909, §§ 2769, 2772, where attorney was employed to defend ejectionment by grantee of warrantor, who was also made party, if both grantee and warrantor had been liable for costs, attorney, hav-

ing incurred expenses in defending grantee's interests, could look to grantee alone for all expenses.—*Lawson v. Bufton*, Mo., 199 S. W. 268.

6. Banks and Banking—Charter.—Bank's charter power "to act as agent for fire insurance companies, associations, or corporations" did not comprehend capacity to insure property against loss by fire, or to indemnify owners against such loss.—*Alabama Red Cedar Co. v. Tennessee Valley Bank*, Ala., 76 So. 980.

7.—Certificate of Deposit.—Bank was bound to pay to person authorized to receive payment under its certificates of deposit, and payment to treasurer of church corporation was not justified, unless he was entitled under terms of certificates.—*Trustees of German Evangelical Lutheran St. John's Congregation v. Merchants' Nat. Bank*, Minn., 165 N. W. 491.

8.—Savings Bank.—Savings bank depositor's written assent at time of deposit to all regulations of institution held not to read into contract subsequently enacted by-law requiring depositor to give notice of loss, destruction, or theft of his book, of which by-law depositor had no knowledge.—*Société De Bienfaisance St. Jean Baptiste De Millbury v. People's Sav. Bank*, Mass., 117 N. E. 921.

9. Bills and Notes—Marginal Memoranda.—A note for \$100, payable on or before a certain date, with marginal memoranda for partial payments before maturity, was not dishonored by non-payment at the expiration of time mentioned in marginal memoranda, which did not change legal effect of words in body of instrument.—*Union State Bank of Minneapolis*, Minn., v. *Benson*, N. D., 165 N. W. 509.

10. Brokers—Abandoning Agency.—Where broker, without disclosure to employer, agreed for commission with person who desired to exchange farm, doing so subsequent to beginning of negotiations between such person and his own employer, arrangement may be regarded as abandonment of agency.—*Whittle v. Klipper*, Ia., 165 N. W. 425.

11. Carriers of Goods—Control by Shipper.—Rule that carrier of goods, upon receiving it for shipment, becomes agent of consignee, has no application where consignor or his agent takes control of goods at point of destination and there exercises such control in delivering goods to purchasers.—*Celli v. Commonwealth*, Ky., 199 S. W. 1.

12.—Demurrage.—A local tariff of demurrage charges applies after it has gone into effect to all cars, even those received for transportation before tariff was issued and filed with commission.—*Chesapeake & Ohio Coal & Coke Co. v. Toledo & O. C. Ry. Co.*, U. S. C. C. A., 245 Fed. 917.

13.—Evidence.—In action against carrier for refusing to forward goods via a connecting line, an erroneous statement of route in billing does not excuse defendant, who knew such statement was erroneous and refused to forward for other reasons.—*Quanah, A. & P. Ry. Co. v. Bone*, Tex., 199 S. W. 332.

14.—Switching Cars.—Where company bound itself to switch cars between industries on its line, words "on the line" refer to physical line, and it cannot be required to switch cars for agreed charge, where to do so necessitated use

of tracks of another company.—National Enameling & Stamping Co. v. Granite City & M. B. L. R. Co., Mo., 199 S. W. 238.

15. **Carriers of Live Stock—Stock Cars.**—Where a carrier had a rule permitting furnishing of stock cars on only two days of each week, a judgment requiring it to furnish cars on call on other days created no discrimination against other shippers, who could assert the same right.—Baird Bros. v. Minneapolis & St. L. R. Co., Ia., 165 N. W. 412.

16. **Chattel Mortgages—Justice of Peace.**—An affidavit and warrant charging the offense of "buying mortgaged property" can be reasonably interpreted as charging a violation of Code 1907, § 7342, which prohibits "removing, selling or buying property to which others have claim," and is sufficient in a court of a justice of the peace.—Nolen v. Jones, Ala., 76 So. 935.

17. **Injunction.**—Petition in landlord's suit against tenant and his mortgagee to enjoin foreclosure of chattel mortgage on furniture of hotel, merely alleging lease, tenant's occupation of hotel, and effect of foreclosure, stated no cause of action.—Beane v. Rucker, Okla., 168 Pac. 1167.

18. **Commerce—Natural Gas.**—The piping of natural gas from one state into another for sale therein to consumers held to constitute interstate commerce.—Landon v. Public Utilities Commission of Kansas, U. S. D. C., 245 Fed. 950.

19. **Work on Railroad.**—Work contributing to safety and integrity of interstate railroad, is part of such road's interstate commerce.—Plass v. Central New England Ry. Co., N. Y., 117 N. E. 952, 221 N. Y. 472.

20. **Constitutional Law—Due Process of Law.**—In action on foreign railroad corporation's notes executed without Massachusetts, service of process on company's statutory agent held due process of law against company in respect to particular cause of action, within Constitution of United States.—Reynolds v. Missouri, K. & T. Ry. Co., Mass., 117 N. E. 913.

21. **Infancy.**—Infancy is personal privilege, and infant has no vested property right in his disability to contract to extent that legislature may not remove disability as to future contracts.—Young v. Sterling Leather Works, N. J., 102 Atl. 395.

22. **Contracts—Consideration.**—Where assignee of contract to furnish maps to a borough promised that as soon as he received payment he would send a sub-contractor his check, the latter's delivery of maps to borough was a valid consideration for assignee's promise.—Thompson v. Peppler, N. J., 102 Atl. 379.

23. **Evidence.**—In action for cash paid out and services as attorney and loan agent, plaintiff cannot complain because defendant took from plaintiff's agent abstract of title prepared by plaintiff and old abstracts and papers handed to plaintiff by defendant; suit not being for conversion.—Carroll v. Wiggains, Mo., 199 S. W. 280.

24. **Illegality.**—In a subscription contest for an automobile, an agreement wherein one of the contestants puts up money without furnishing a bona fide list of subscribers, money to be returned if that contestant does not win, is illegal and fraudulent.—Monroe v. Smith, S. D., 165 N. W. 532.

25. **Corporations—Estoppel.**—To legalize transactions purporting to be the acts of corporations, apart from estoppel or ratification, there must be express authorization in the law or a necessary implication of authority.—Orpheum Theatre & Realty Co. v. Seavey & Flarsheim Brokerage Co., Mo., 199 S. W. 257.

26. **Foreign Corporation.**—Settlement of account between foreign corporation and debtor, who gave notes for balance due, was mere collection of debt, and not transaction of such corporation within state, so that it could recover on notes, though it had not complied with Const. 1901, § 232, and Code 1907, § 3642.—Holman v. Durham Buggy Co., Ala., 76 So. 914.

27. **Promise by Promoter.**—Capital stock of gold mining company having become worthless, one who took stock therein under agreement of organizers to save him harmless and to reimburse him, held entitled to sue organizer at law for reimbursement with interest.—Vinton v. Pratt, Mass., 117 N. E. 919.

28. **Stock as Collateral.**—Where stock was held as collateral to a note, and money was received from a liquidating agent of the corporation on part of such stock, the application of such money on the note without formality, either before or after maturity, was recourse to the collateral, within stipulation, that if recourse be had to the collateral, any excess received should be applied to any other claim of payee against the maker.—Haldane v. New York State Nat. Bank of Albany, N. Y., 167 N. Y. S. 755.

29. **Damages—Mitigating.**—Where lessee was deprived of possession by wrongful act of third persons, it being his duty to use reasonable means to minimize his damages, jury should determine what amount plaintiff earned, or by exercise of reasonable effort he could have earned, in same or similar business elsewhere.—McCauley v. McElroy, Tex., 199 S. W. 317.

30. **Death—Evidence.**—In action for death of boy by electric shock, evidence of his health, habits of industry, economy, etc., and defendant's evidence tending to show diminution in value of services by reason of health or business habits, is admissible.—Kribs v. Jefferson City Light, Heat & Power Co., Mo., 199 S. W. 261.

31. **Right of Recovery.**—That a daughter of deceased was a school teacher and capable of supporting herself does not bar her right to recover for her father's death if she suffered pecuniary loss by reason thereof.—Panhandle & S. F. Ry. Co. v. Tisdale, Tex., 199 S. W. 347.

32. **Deeds—Acknowledgment.**—Notary's certificate, reciting that "before me personally appeared J. R., a widower, and his wife, who acknowledged that they executed" the deed, sufficiently stated the acknowledgment of J. R.—Hinton v. McDowell, Mo., 199 S. W. 256.

33. **Constructive Delivery.**—Constructive delivery of a deed is sufficient, and leaving of a deed with a third person with direction to deliver it during grantor's lifetime would manifest intention to deliver and would be constructive delivery, though third person failed to follow instruction.—Baxter v. Chapman, Ga., 94 S. E. 544.

34.—Inadequate Consideration.—A conveyance by a mother to her son for a consideration only slightly more than half the value of the property conveyed, cannot be impeached by a daughter who otherwise would have taken as an heir of the mother.—*Meyer v. Stortenbecker*, Ia., 165 N. W. 456.

35.—Intent.—Where seller of land to surety on his note, surety agreeing to pay note as part of price, executed deed and left it with scrivener, and surety, after discovering it was not acknowledged, left it in same hands, but went into possession, there was delivery in law of deed, passing title; such being intention.—*Durango Trust Co. v. Campbell*, Colo., 168 Pac. 1174.

36.—Validity Between Parties.—As between the parties to a deed or persons claiming under them, a deed is admissible, in action to quiet title, even if not acknowledged.—*Hinton v. McDowell*, Mo., 199 S. W. 256.

37. Election of Remedies—Honest Mistake.—That an attorney was mistaken as to the rights of his clients, in filing a suit to establish a lien on land instead of showing an express trust, will not defeat those rights if afterwards properly alleged and proved, but only goes to the weight to be given to the evidence.—*McBride v. Briggs*, Tex., 199 S. W. 341.

38. Eminent Domain—Evidence of Value.—In action for resulting damages to land by improvements by railroad, while fact that street was graded and improved by changes made, instead of being muddy and impassable as it had been before, could be considered as enhancing value, erection of depot and double-tracking of rails could not be so considered.—*Louisville & N. R. Co. v. Orr*, Ala., 76 So. 961.

39. Executors and Administrators—Discretion.—Where the executor in good faith, and in the belief that the security was adequate, loaned money thereon to the proctor of the estate, he should be charged only by requiring an indemnity against loss, and should not be personally charged with the deficiency in the security.—*In re Slater's Estate*, N. J., 102 Atl. 384.

40. False Pretenses—Indictment and Information.—In prosecution for obtaining personal injury settlement by falsely representing that accused's co-conspirators were injured in street car collision, an indictment held insufficient because not alleging that attorney who secured settlement acted for accused, and for alleging that settlement was obtained by reading "purported" statement of co-conspirators.—*State v. Small*, Mo., 199 S. W. 127.

41. Gaming—Statutory Construction.—Since Rev. St. 1908, § 4753, prohibits allowing gambling, it was not intended by § 4750, prohibiting the keeping of devices adapted to gambling, to prohibit one from allowing gambling on his premises, but such section is aimed at the device, and mere use of a common table for playing poker did not make it a "gambling device."—*State v. Morris*, Mo., 199 S. W. 144.

42. Good Will—Competition.—Where defendant sold his interest in a business covenanting not to enter into competition with plaintiff, fact that parties thereafter did business as partners does not warrant defendant after dissolution of second partnership in competing with plaintiff.—*Schluter v. McLeod*, Tex., 199 S. W. 311.

43. Highways—Access to Property.—An owner of land abutting on highway is not entitled as against public to access to his land at all points in the boundary between it and the highway, and it is sufficient if he has free and convenient access to his property and improvement thereon.—*Wegner v. Kelly*, Ia., 165 N. W. 449.

44. Homestead—Collateral Attack.—Void appraisal and assignment of homestead is not res adjudicata, and is subject to collateral attack, and even if not void, it is subject to attack by creditors not notified of the proceeding, even after 30 days from filing of the return, the time provided by Civ. Code 1912, § 8711, for filing objections.—*Nixon Grocery Co. v. Spann*, S. C., 94 S. E. 531.

45.—Head of Family.—The homestead right remains with the mother, who was the head of her family, although her children and other dependents may have left her.—*Martin v. Cox*, Mo., 199 S. W. 185.

46. Husband and Wife—Acknowledgment.—Where a deed to land was executed and delivered by a wife without the signature or acknowledgment of the husband, it was not valid, although the husband afterward signed and acknowledged the deed.—*Hensley v. Blankinship*, N. C., 94 S. E. 519.

47.—Joinder in Suit.—Where a wife having no interest in her husband's land other than inchoate dower, signed a mortgage with her husband, she was not properly joined as a plaintiff in an action for surplus from a foreclosure sale of such property.—*McRight v. Farned*, Ala., 76 So. 975.

48. Insane Persons—Pauper.—The county cannot recover, from the estate of an insane person, moneys expended for his care at the state asylum, after determination that he had no estate sufficient to care for him, and that he was an insane pauper patient of the county.—*Nodaway County v. Williams*, Mo., 199 S. W. 224.

49. Insurance — Construction of Policy.—Under fire insurance policy covering grain owned by insured while in its elevator, etc., or in cars within 100 feet thereof, grain in car within such distance, loaded by insured, for which he had taken bill of lading to himself as consignee, was covered by policy.—*Dodge Elevator Co. v. Hartford Fire Ins. Co.*, Minn., 165 N. W. 487.

50.—Estoppel.—Where member of benefit society defaulted in payment of dues, and thereafter made payments to local officer, who remitted to society, which kept money for 20 days without objection, society was bound to pay member's policy.—*Hopper v. Brotherhood of American Yeoman*, Mo., 199 S. W. 278.

51.—Fidelity of Employes.—It is reasonable requirement, in insurance of another against dishonest acts of employes, that assured shall give information and institute prosecution against guilty employe, where required.—*Maryland Casualty Co. v. Laurel Oil & Fertilizer Co.*, Miss., 76 So. 875.

52.—Material Representations.—Representations that insured had not had fits or hernia were material under Gen. St. 1913, § 3527, avoiding a policy for misrepresentations, which "materially affected the acceptance of the risk."—*Olsson v. Midland Ins. Co.*, Minn., 165 Pac. 474.

53.—Material Representation.—In action on fire insurance policy, where insurer warranted truth of answers and had stated in application that only power used was "water," when in fact it used auxiliary gasoline engine, requiring the storage of fuel gasoline and increasing the

risk, held, that insurer was entitled to directed verdict.—*Corbin v. Millers' Mut. Fire Ins. Co. of Harrisburg, Pa.*, 102 Atl. 425.

54.—**Waiver.**—Fraternal society, furnishing blanks for proofs of death, held to have waived delay in giving notice of death, notwithstanding indorsement on letters and blanks reserving all defenses.—*Boaz v. Order of Commercial Travelers of America, Colo.*, 168 Pac. 1178.

55. **Landlord and Tenant—Estoppel.**—Even if tenant was induced to execute lease by landlord's fraudulent promises that no restaurant would be permitted in building, the tenant by paying rent after restaurant was installed, precluded herself from rescinding lease.—*Arcade Inv. Co. v. Hawley, Minn.*, 165 N. W. 477.

56.—**Holding Over.**—Where before expiration of lease receiver of lessee was in possession, and several days after expiration new company took over assets, there was a hiatus preventing application of rule that where lessee holds over under written lease landlord may treat continued occupancy as tenancy for another year, on the same terms.—*Kyle v. Gadson Hardware & Supply Co., Ala.*, 76 So. 951.

57.—**Renewal.**—Though acts of successor of lessee of room in building, in going into possession, etc., might be treated as showing it assumed obligations of original lessee, so far as relating to use of leased premises for term, such successor did not become bound by further agreement of lessee contemplating renewal by holding over.—*Iowa Implement Co. v. Aetna Explosives Co., Ia.*, 165 N. W. 408.

58. **Libel and Slander—Candidate for Office.**—A communication as to fitness of a candidate for an elective public office, made in good faith by an elector to other electors to enable them to judge as to the propriety of voting for such candidate, is within doctrine of qualified privilege.—*State v. Fish, N. J.*, 102 Atl. 378.

59.—**Epithets.**—Where words were not addressed to plaintiff, and case was not tried on theory that defendant's statements that plaintiff was a dirty liar and thief, etc., were mere epithets, and not intended as imputing charge of theft, charge that words were slanderous per se was proper.—*Vanhoozer v. Butler, Ark.*, 199 S. W. 78.

60.—**Libel per se.**—A publication that members of a theatrical company failed to receive their salaries for a week, and some of them had gone to New York, refusing to continue further, is not libelous per se, as charging that plaintiff, conducting it, was insolvent.—*Naylor v. Variety, N. Y.*, 167 N. Y. S. 772.

61.—**Libel per se.**—Statement of a woman, "The boys have been hanging around here like a pack of dogs after a bitch," plainly charged her with being an immoral woman, and no explanation of hearer's understanding thereof was necessary.—*McCollum v. Smith, Mo.*, 199 S. W. 271.

62. **Master and Servant—Course of Employment.**—A night watchman, who went asleep and fell through an open doorway, held not injured within line of his employment under Workmen's Compensation Act.—*Gifford v. T. G. Patterson, Inc., N. Y.*, 117 N. E. 946.

63.—**Employee.**—Person employed by employer's foreman and driving the foreman's own team held an employee of the employer, and not of the foreman; the contention that the foreman in hiring men and teams together acted as contractor being without merit.—*Yolo Water & Power Co. v. Industrial Acc. Commission of California, Cal.*, 168 Pac. 1146.

64.—**Obvious Danger.**—Where the danger from placing a ladder against a hinged, unbolted transom is obvious, and a servant who has cleaned the transom weekly for several months has equal opportunity with the master to know its condition, the master is under no duty to secure the bolt.—*McLean v. Studebaker Bros. Co. of New York, N. Y.*, 117 N. E. 951, 221 N. Y. 475.

65.—**Safe Place to Work.**—Where runaway car collided with train on which plaintiff's intestate was fireman, accident resulting in his death, it was evidence of negligence that defendant had no lookout on rear end of train, which was moving backward.—*Mumpower v. Black Mountain Ry. Co., N. C.*, 94 S. E. 515.

66.—**Warning.**—Railroad company is not bound to warn or instruct its section men as to their duty in moving and piling ties, 8 or 9 inches square, 12 feet long, and weighing approximately 150 pounds.—*Rook v. Davenport, R. I. & N. W. Ry. Co., Ia.*, 165 N. W. 419.

67.—**Workmen's Compensation Law.**—Workmen's Compensation Law, § 21, presuming that injury was not caused by employee intentionally or from his intoxication, is inapplicable on question whether injury arose within employment.—*Gifford v. T. G. Patterson, Inc., N. Y.*, 117 N. E. 946.

68. **Mechanics' Liens—Destruction of Building.**—A mechanic's lien does not attach to the land after building's destruction, and probably does not survive as to land if building's destruction occurs after filing lien.—*Pistrand v. Greenamyre, Cal.*, 168 Pac. 1161.

69. **Mortgages—Improvements.**—Where mortgagee in good faith took possession, he is, on accounting, entitled to compensation for improvements placed on land in good faith before suit, but interest should not be allowed thereon for period during which he was in possession.—*McGuire v. Halloran, Ia.*, 165 N. W. 405.

70. **Municipal Corporations—Culpable Negligence.**—While failure of flagman to perform duty will not wholly absolve traveler from duty to look, it may relieve him from what might otherwise have been culpable negligence.—*Stephan v. Chicago, B. & Q. R. Co., Mo.*, 199 S. W. 273.

71.—**Materialman's Lien.**—Under Rem. Code 1915, § 1161, notice of claim filed with Port of Seattle by materialmen who dealt with port's contractor to erect transit shed, held sufficient, though giving no notice of intention to assert claim against statutory bonds.—*Van Doren Roofing & Cornice Co. v. Guardian Casualty & Guaranty Co., Wash.*, 168 Pac. 1124.

72.—**Proximate Cause.**—Where city raised grade of lot causing mud to overflow plaintiff's sidewalk, and plaintiff, while sweeping off mud, pushed against a coil of wire lodged in pavement, with her broom, and it sprang back and sent mud into her eye, causing loss of its sight, the pushing of wire, and not the presence of mud, was proximate cause of accident.—*Bruggeman v. City of York, Pa.*, 102 Atl. 415.

73.—**Punitive Damages.**—Where a city drained its reservoir annually into a creek running across plaintiff's land, and plaintiff had previously recovered for damages therefrom, that the negligent act recurred does not show malice or an intent to oppress, warranting punitive damages.—*City of Covington v. Faulhaber, Ky.*, 199 S. W. 32.

74.—**Speed Regulation.**—In action for injuries in automobile accident, the jury could consider, on the question of the proper rate of speed of the automobile, the fact that the street was torn up, that traffic was heavy, and that all vehicles had to pass on the street car tracks and not on the other portion of the pavement.—*Hood & Wheeler Furniture Co. v. Royal, Ala.*, 76 So. 965.

75.—**Street Assessment.**—Merely because concrete paving is of poor quality, and in seven years has become badly cracked and disintegrated, though cause is doubtful, does not give property owner cause of action to enjoin collection of special assessment for cost of paving on ground of fraud.—*Plagman v. City of Davenport, Ia.*, 165 N. W. 393.

76.—**Traffic on Streets.**—A municipal ordinance regulating traffic on streets is not void for unreasonableness or uncertainty because it fails to provide the rule of evidence that a rate of speed in excess of 30 miles an hour for a distance of a quarter of a mile shall be presumptive evidence of excessive speed as is provided by Acts 1911, p. 642, § 21.—*Hood & Wheeler Furniture Co. v. Royal, Ala.*, 76 So. 965.

77.—**Trees Bordering Sewer.**—Where roots of shade trees in boulevard of street in Tacoma grow into and clog a sewer several times, city may cut them down without liability for damages, under Tacoma Charter, § 86, relating to control of streets.—*Schaller v. City of Tacoma, Wash.*, 168 Pac. 1136.

78. **Negligence—Statutory Construction.**—Labor Law, § 79, requiring hoistways, hatch-

ways and well holes of factories to be protected on all sides at each floor by substantial vertical inclosures, does not apply in favor of fireman, answering fire alarm, injured by falling into coal pit on burning premises.—Meiers v. Fred Koch Brewery, N. Y., 167 N. Y. S. 740.

79. **Railroads—Evidence.**—Where team and interurban car collided at a highway crossing, evidence that car was traveling from 30 to 35 miles an hour, and that no warning signals were given until after team got upon track, held to support a verdict for plaintiff.—Yokum v. Atchison, T. & S. F. Ry. Co., Mo., 193 S. W. 263.

80. **Removal of Causes—Filing Petition.**—It is essential to the removal of a cause that the petition provided for by the statute be filed with the state court within the time fixed by statute, unless the time be in some manner waived.—Southern Pac. Co. v. Stewart, U. S. S. C., 38 Sup. Ct. 130.

81. **Sales—Delivery.**—Under contract as construed by letters between parties, held, that buyer could not compel seller to deliver whole of shipment made in vessel, on theory that entire cargo had been purchased, but seller was bound only to deliver minimum quantity specified.—Pennsylvania Sugar Co. v. Czarnikow-Rionda Co., U. S. C. C. A., 245 Fed. 913.

82. **Perishable Goods.**—If the seller ships perishable goods, which must be speedily disposed of, and they are not up to specifications, the purchaser may dispose of them, if the seller cannot be communicated with and his instructions cannot be quickly obtained.—White v. Schweitzer, N. Y., 117 N. E. 941, 221 N. Y. 461.

83. **Reservation of Title.**—Plaintiff having reserved title to automobile and having elected to repossess same, he could not thereafter subject buyer to liability for unpaid purchase price on ground that his possession was under lien for repairs.—Alexander v. Mobile Auto Co., Ala., 76 So. 944.

84. **Specific Performance—Ground of Recovery.**—Specific performance of contract for sale of land which would require conveyance for inadequate consideration should be denied, and plaintiff, who lent funds to discharge purchase-money obligations inducing defendant to sign through fraud, is entitled only to recover loan.—Darnell v. Alexander, Ky., 199 S. W. 17.

85. **Street Railroads—Last Clear Chance.**—If motorman, carelessly coasting to intersection with street where view was obscured, was unable to stop car when he saw carriage, street railway was not necessarily relieved of negligence if motorman's failure to control car was because he was handicapped by his own carelessness in attaining high speed.—Bridenstine v. Iowa City Electric Ry. Co., Ia., 165 N. W. 435.

86. **Subrogation—Right to.**—Deed and a check of third persons for purchase price of land having been delivered in escrow to be held until mortgage to secure purchase price was executed by grantee and delivered to makers of check, where deed and check were delivered and mortgage not executed, makers of check were subrogated to vendor's lien discharged by payment of check.—Gibson v. Gibson, Ala., 76 So. 949.

87. **Sunday—Statutory Construction.**—The word "druggist," within Code 1907, § 7814, prohibiting "any person who, being a merchant or shopkeeper, druggists excepted," from keeping open store on Sunday, refers to the occupation and not to the person, and a druggist cannot sell anything but drugs on that day.—Stollenwerck v. State, Ala., 77 So. 52.

88. **Telegraphs and Telephones—Elevation of Wires.**—While telegraph and telephone wires crossing a highway must be high enough for the usual and ordinary travel, they need not be high enough for extraordinary travel, in which case traveler must keep a lookout.—Wegner v. Kelly, Ia., 165 N. W. 449.

89. **Instructions.**—In action against telephone company for cutting trees, the province of the jury was invaded by an instruction to find for plaintiff under the first count if defendant's president directed its agents to clear its telephone lines of all timbers touching them, as being, in effect, an instruction that the cutting was willful if the president ordered all

timber removed which touched the line, irrespective of his knowledge or intent.—Climer v. St. Clair County Telephone Co., Ala., 77 So. 30.

90. **Limitation of Liability.**—Where sender of telegram telephoned it to the company's agent, who wrote it upon blanks containing provisions limiting liability, such provisions were not binding as a part of the contract.—Postal Telegraph-Cable Co. v. Prewitt, Tex., 199 S. W. 316.

91. **Liability.**—If defendant undertook by telegraph to pay or cause to be paid to plaintiff's wife a certain sum of money deposited with it, and negligently failed to do so, it would be liable, although it did not maintain a line of telegraph between point of receiving and destination, and was not engaged in business of transmitting telegraphic money orders.—Western Union Telegraph Co. v. Bowen, Ala., 76 So. 985.

92. **Taxation.**—Provision of ordinance granting franchise to telegraph company, for payment of annual license tax on each pole erected, applies to poles on railway right-of-way, specified as part of its route.—Mackay Telegraph & Cable Co. v. City of Little Rock, Ark., 199 S. W. 90.

93. **Trover and Conversion—Right of Action.**—Defendant's cutting out of plaintiff's locks and substituting locks of his own on barns where plaintiff kept his personal property, held to constitute conversion.—Jones v. Stone, N. H., 102 Atl. 377.

94. **Trusts—Direction by Trustor.**—Where the purpose of a trust deed is the application of income from land to the use of the beneficiary, a power of sale as the trustees "may deem best for the interest of their trust," was sufficient direction for disposal of the proceeds, as prescribed by Clv. Code, § 857, before its amendment.—Aldersley v. McCloud, Cal., 168 Pac. 1153.

95. **Vendor and Purchaser—Rescission.**—Sale of portion of restrictive residential subdivision to railroad company for right of way warrants purchasers under executory contracts in rescinding their contracts, it not appearing that sellers, who were also bound by restrictive covenants, were compelled to make sale, or that property was necessary to company and subject to condemnation.—Houser v. Paducah & I. R. Co., Ky., 199 S. W. 3.

96. **Waters and Water Courses—Mandatory Injunction.**—Injunction to prevent defendant from forcing by a wall water to accumulate on his land over plaintiff's land, in a way contrary to its natural flow, is not unlawful on ground that it is mandatory, as compelling defendant to do an affirmative act of pulling down his wall.—Sweetman v. Owens, Ga., 94 S. E. 542.

97. **Riparian Rights.**—To entitle riparian owner to injunction, he must show not only that defendant makes or threatens unreasonable use of the water, but must further establish facts entitling him to such relief under general equitable principles applicable to injunctions.—McDonough v. Russell-Miller Milling Co., N. D., 165 N. W. 504.

98. **Wills—Construction of Instrument.**—Written instrument signed by father purporting to convey to his son certain land in fee simple not to take effect until after father's death, and under which son was to occupy premises as tenant, with direction for its delivery after father's death, was a will and not a deed.—Baxter v. Chapman, Ga., 94 S. E. 544.

99. **Residuary Estate.**—After bequest of residuary estate in trust to pay income to three legatees for life, with proportionate share of principal over to child or children of deceased legatees, codicil revoking bequest to one legatee did not affect gift in remainder to his children, but created an intestacy as to such income, which such legatee would have received.—In re May's Estate, Pa., 102 Atl. 422.

100. **Testamentary Character.**—If testatrix placed money at the disposal of defendant with the understanding that he was to pay interest thereon until her death, and on her death the money was to be his, the gift was a testamentary disposition which was invalid in the absence of compliance with the requirements of the statute of wills.—Reed v. Bonner, N. J., 102 Atl. 383.

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DISLOYAL UTTERANCES GROUND FOR NULLIFYING CONTRACT WITH STUDENT BY COLLEGE.

The case of Sampson v. Trustees of Columbia University, 167 N. Y. Supp. 202, decided in Special Term of New York Supreme Court, is very instructive upon the question of the right of an educational institution, having the duty to inculcate patriotism and obedience to lawful authority, to cut off from its student body the malign influence of disloyalty in its midst.

In this case an injunction was applied for by the guardian *ad litem* of a student, who had been refused by the faculty to be allowed to complete a course in a university on the road to graduation, which it is alleged the university had agreed to extend to him. The injunction prayed for relief on final judgment and for continuance at the University *pendente lite*.

The University assigned as justification for its refusal to allow plaintiff to continue as one of its students his utterances in public addresses not within the University walls. Thus in one of these addresses he said: "We have no love for the Kaiser, but as much as we hate the German Kaiser, we hate still more the American Kaiser," and he advocated riots in resistance to enforcement of the provisions of the selective service law enacted by Congress.

The three grounds urged by the Trustees were that there had been completion of the course for the academic year for which plaintiff had been admitted; that admission there was on implied agreement that he should not "engage in any activities or take part in any movement which would involve the University in undesirable notoriety;" and that there was vested in the University a disciplinary discretion as conferred by its charter to refuse to extend its privileges to undesirable students.

The court, giving to plaintiff the benefit of all doubt on his claim to a contractual status, comes down to the third ground urged by the Trustees and disposes of that in favor of the Trustees.

Judge Mullan, presiding, said: "I think it will be conceded that the duty of an institution of learning is not met by the mere imparting of what commonly goes under the name of knowledge. By the common consent of civilized mankind through the ages, not the least important of the functions of a school or college has been to instill and sink deep in the minds of its students the love of truth and the love of country. Is such conduct as that of the plaintiff calculated to make it more difficult for the defendant University to inculcate patriotism in those of student members—if there be such unfortunates—who are without it? Does language of the sort used by plaintiff make him a real or potential menace to the morale of the defendant's student body and a blot on the good name of the famous and honored University whose degree he seeks? We are a tolerant people, not easily stirred, prone to an easy-going indulgence to those who are opposed to the very essentials and vitals of our organized social life; but there must of necessity be a limit somewhere to the forbearance that can with safety be extended to the forces of destruction that hide behind the dishonestly assumed mask of the constitutional right of free speech. To attempt to state in general terms the difference between an honest and a dishonest exercise of the wholesome right of free speech that our Constitution so completely and properly respects would be as vain as it would be unprofitable here. * * * To counsel resistance to the draft ordained by lawful authority in accordance with our form of government is as culpable as it is cowardly. * * * Whether the plaintiff's conduct comes within the accepted definitions of sedition or treason, I have not concerned myself to inquire."

The principle of the right of free speech standing for anything else than a bare right and covering a course of conduct in any and all situations is as foolish as to say, that a man having the natural right to curse and swear, if he so inclines, may do this in any company or in any place without being branded for indecency or without becoming subject to arrest for conduct provoking a breach of the peace. Words are acts in some situations and, if in exercising a constitutional right, they are lost sight of except in the influence they create or the opprobrium they bring upon another, it is words as acts that are considered and not words as speech.

We are interested, however, in the view discussed as regards teaching being more than education of man as an animal, and not as a human being. To say that our policy goes further than imparting knowledge and includes the instilling of correct principles of conduct and love of country, assumes, that our states are far from Godless in their recognition of the right of its citizens to worship God or not worship God, as their consciences may dictate. At bottom it is the right of conscience that is guaranteed. There is no misprision of treason in our land, but of overt acts we take account.

At all events, if our educational institutions have no power to inculcate the observance of loyalty to the country that supports them, we erect, then, a system that has in it the seeds of its own destruction. It becomes a reproach and not something to be lauded. It is passing strange, that the burden of our regulatory laws are borne uncomplainingly by our loyal citizens, but when there is encountered one who is so seditiously inclined that he would destroy government itself, he is as voluble in claiming rights thereunder as if he really believed it lawfully established and deserving of ungrudging support. It hardly may be deemed an assault on free speech to classify his utterances as noxious vapor.

NOTES OF IMPORTANT DECISIONS.

WORKMEN'S COMPENSATION ACT — ELECTIVE ACT APPLIES TO NON-RESIDENT EMPLOYEE INJURED IN ANOTHER STATE.—In State ex rel. Chambers v. District Court, 166 N. W. 185, decided by Supreme Court of Minnesota, it was held that where an employe, who was a non-resident of the state and employed as a traveling agent to solicit business, was injured by an automobile furnished him by his employer, who had elected to come under the Minnesota Workmen's Compensation Act and be bound thereunder, the fact of the injury happening in another state did not take it out of the provisions of the act.

After speaking of the act being elective the court said: "That under our act there is a contract obligation is clear. The weight of authority supports the view that under an elective act like ours and with facts such as are present, an accidental injury though it occurs outside the state is compensable. This view we adopt. * * * A basic thought underlying the compensation act is that the business or industry shall in the first instance pay for an accidental injury as a business expense or a part of the cost of production. It may absorb it or it may put it partly or wholly on the consumer if it can. The economic tendency is to push it along just as it is; to shift the burden of unrestrained personal injury litigation. When a business is localized in a state, there is nothing inconsistent with the principle of the compensation act in requiring the employer to compensate for injuries in a service incident to its conduct sustained beyond the borders of the state. The question of policy is with the legislature. It may enact an elective compensation act bringing such result if it chooses."

While it has been held that a state compensation act could not interfere with service and remedies for injuries in interstate transportation, this was because congress had occupied that field, otherwise it is conceivable it would apply. Just as remedies against interstate carriers for injuries theretofore depended on state law, so as to those in interstate matters, where congress has not intervened.

But the thought is that the policy of a state under a workmen's compensation act can be enforced as against business having its *situs* there. And we have little doubt that this is true. There is a contractual relationship governed by local statute. It seems evident this is valid, and we discover no difference in a workmen's compensation act being compulsory

or elective. The policy is as much concerning the welfare of the business as in the interest of employee, and to have differing rules as to injury occurring within the state and outside the state, is to militate against the plan as an entirety.

DIVORCE—DECREE AS TO LAND IN ANOTHER STATE.—*Bates v. Bodie*, 38 Sup. Ct., 182, decided by U. S. Supreme Court, reverses the Supreme Court of Nebraska, which rendered judgment in favor of a divorced wife obtaining a decree in Arkansas, upon the ground, that the land owned by the defendant in Nebraska, not being embraced in the Arkansas suit, could be taken into account in action in Nebraska upon the Arkansas decree and new finding there made as to what the defendant ought to pay his wife, because of his ownership of such land.

The interesting question, or rather the series of questions, thus presented receive no solution at the hands of U. S. Supreme Court, because it was held, that the state court of Arkansas, though having no particular jurisdiction over Nebraska land, was shown by the evidence to have taken their ownership into consideration in the rendition of the decree.

Possibly U. S. Supreme Court decision holds that, whether this ownership was actually taken into consideration or not, this was within the scope of the judgment rendered by Arkansas court and it operated as an estoppel in Nebraska in the later suit for fixing the amount of alimony. The ruling by U. S. Court leaves this somewhat in a state of uncertainty.

Speaking of the contention, that the Arkansas court did not take into consideration ownership of the Nebraska land, it was said: "This proposition is based on the record, which the (Nebraska) Supreme Court said: 'Shows that the (Arkansas) court did not in fact make any allowance on account of the Nebraska lands,' and resort is had to parol testimony for the purpose of limiting the decree. But we cannot give the testimony such strength. It is conflicting. It consists of the impression of opposing counsel and of the private opinion of the court orally delivered in direction for the decree."

Speaking of the recollection of the trial judge it was said: "His view was that the court had jurisdiction of the parties, and held it had not of the land in Nebraska, but it did have jurisdiction to consider its value in determining the amount of alimony."

It seems to us that U. S. Supreme Court should have said whether or not Arkansas

court could or not take the Nebraska land into consideration, for such purpose and if Nebraska court found it did not, its holding should have been sustained upon conflicting evidence, if as matter of law it had the right to consider the evidence at all.

COMMERCE—INTOXICATING LIQUORS IN TRANSIT THROUGH PROHIBITION STATE.

—In *Moragne v. State*, 77 So. 322, the Supreme Court reverses a ruling of Alabama Court of Appeals holding that one transporting intoxicating liquors through the prohibition state of Alabama en route from Georgia to Florida came under the law of Alabama by virtue of provisions of the Webb-Kenyon Act.

The court said that the trial court and the court of appeals held that Alabama prohibition statute in connection with the Webb-Kenyon act prohibited such carrying through Alabama. "Where the holding of the Court of Appeals correct, then it would follow that there could not be an interstate shipment through this state along the public highways thereof from one person to another of intoxicating liquors, even though the shipping point and the point of delivery be in different states and neither in this state." It was thought that an attempt to effect such a result would be to make the statute unconstitutional.

It would seem that this is true, however plausibly it might be claimed, that the use of highways which come under a state's police power *pro tanto* is a submission to state power. The same reasoning would paralyze effort of interstate commerce commission to prescribe rates in interstate transportation. The history of the exercise of such power by such commission is against the validity of such a claim. It, however, would seem to be different, were there a rest in the intermediate state and then, resort were had to a local company under complete control of the state to aid in a delivery. This is a new question that lately has been considered in two cases, involving the same subject matter, one case by Supreme Court of Kansas and one by a federal district court. *State ex rel. Kaster v. Landon*, 96 Kan. 372, 152 Pac. 22; *Landon v. Pub. U. Comm.* 245 Fed. 950. There the effect of storing gas and distributing it through pipes to customers in cities is considered. As to this the state and federal court are in opposition. It seems to us the state court takes the sounder view. An article on this subject will shortly appear in this journal.

POWER OF MUNICIPALITY HAVING RIGHT TO LICENSE OR PROHIBIT SALE OF INTOXICATING LIQUOR, TO AIM AT THE LATTER UNDER GUISE OF PROHIBITORY LICENSE LAW.

Licensing, Regulation and Prohibition.

It is quite usual for statutes to vest in cities and towns the right to license, tax, regulate and (or) to prohibit the sale of intoxicating liquors. And in such event ordinances in fixing licenses so onerous as to be virtually prohibitory have been upheld. Thus it is stated in Cyc.¹ that as the Legislature having unlimited control over the liquor traffic, may fix a license fee at any sum in its absolute discretion and no one can complain that this is in effect prohibitive, "the same rule applies in the case of a municipal corporation which by its charter or a general statute possesses full control over the traffic." And it has been ruled that the power to license cannot be used to suppress useful occupations.² This view has been taken, as for example, by the Supreme Court of New Mexico³ distinguishing between grants of power to "license or regulate" and where the grant was to "license, regulate or prohibit."⁴

But it has been said that: "When prohibition is the object, the end may generally be more directly accomplished by legislation which by its terms is prohibitory, than by the circuitous method of imposing a burden difficult or impossible to be borne; and the direct method is consequently the one usually adopted."⁵ And in a Georgia case⁶ the court, *arguendo*, said: "We think the best way to prohibit is to prohibit." The court argued further, that if the ordinance in question had been aimed at usurers, this

might be different, but it said nothing specific regarding sale of intoxicating liquor. This kind of a sale stands, it is conceivable, differently from the practicing of usury. Contracts are respected as to the one, but not as to the other, thing.

Strict Construction of Powers Conferred on a Municipality.—In discussing the grant of powers to a city or town as a governmental agency, it is to be remembered that "it is a well settled rule of law, that a municipal corporation has only such powers as are expressly conferred by its charter, or by some other legislative enactment, or which are necessarily implied from the general objects and purposes of the municipality, or implied from some other power expressly granted by the legislature."⁷ And upon this principle it is endeavored herein to inquire whether under a power conferred on a municipal corporation to license, regulate or (and) prohibit the selling of intoxicating liquor in its limits, a municipal corporation, when it undertakes, by ordinance, to license, regulate or prohibit, the doing of each being within its conferred powers, it may, under guise of the exercise of one of such powers, aim at the other. For example, if a city may license, may it do this as a means of regulation or with the purpose to suppress or prohibit? Thus it is said in a Virginia case,⁸ that where a city charter empowers it to wholly prohibit the sale of intoxicating liquors or license such sale, the only limitation on such a grant is its exercise in good faith. Is it an attack on the exercise of good faith to show that a license fee is not intended as a regulation, but as a means of prohibition? This language in that case was used merely *arguendo*, but does it not suggest a negative pregnant? Certainly an ordinance to prohibit sales could have no relation to licensing sales. May one to license have any relation to prohibition of sales?

(1) 23 Cyc. 149.

(2) McQuillin, Municipal Corporations, 992, citing cases.

(3) Schwartz v. Gallup, N. M., 165 Pac. 345.

(4) See also Dennehy v. Chicago, 120 Ill. 227, 12 N. E. 227; Tenny v. Lenz, 16 Wis. 566; State v. Cassidy, 22 Minn. 312, 21 Am. Rep. 765.

(5) 2 Cooley on Taxation (3rd ed.), p. 1134.

(6) Morton v. Macon, 111 Ga. 162, 36 S. E. 627.

(7) Gambill v. Endrich Bros., 143 Ala. 506, 39 So. 297.

(8) Danville v. Hatcher, 101 Va. 523, 44 S. E. 723.

Regulation by a City Having Right to Prohibit.—Waiving for a moment the question whether a license is a means of regulation, there is now considered whether any regulation, *quoad* regulation, may be justified by a city which has the right absolutely to prohibit.

In a North Carolina case,⁹ where regulations were attacked as unlawfully stringent, it was said: "It (the Legislature) had the right to have absolutely prohibited the intestate or anyone else from selling liquor within one mile of the corporate limits of the city of Raleigh. This it did unless the party selling obtained a license from the city authorities. And instead of this right to do so with the permission of the city authorities being a restriction, its effect was to relax the prohibitory rule, and to grant him a right he did not otherwise have. * * * How he was damaged by having this privilege, this option, which he chose to accept, we are unable to see." The question in mind is not strictly what I am attempting to discuss, but it leads in that direction. There is closer approach to it in a later case by this same court.¹⁰ That case said: "It was argued in this court for the defendant, that, as the board of aldermen were given the power to prevent the sale of intoxicating liquor within the city limits, therefore, under the maxim that 'the greater includes the less,' ordinance regulating and restricting the traffic, if the aldermen should see fit not to prevent, but to license, whether reasonable or unreasonable, were matters in their discretion and not reviewable by the courts. We think that is not the proper view of the powers of the aldermen, or of the rights of those who may be licensed to sell liquor by the board. They, as we have said, had the right to prevent or prohibit entirely the sale of liquor. They also had the power to license the traffic and to regulate it, and having adopted as a

choice the plan of licensing and then regulating, it must follow that the regulations and restrictions must be such as are reasonable, and their reasonableness must be in case of contest finally decided by the courts."

This excerpt shows, that the power conferred is of several things, distinct in their nature, and the exercise of one may or not exclude exercise of the other—if the city licenses, it does not prohibit; if it prohibits, it does not license. It has the power to license as a policy, but to say this may be exerted for the purpose of prohibiting, is to confer on a tribunal of strict powers, something not reasonably embraced in the grant of power. How an ordinance enacted by a city for license with a real purpose of prohibition would work is exemplified in a Georgia case.¹¹ The court said: "It may be that in cities where the sale of liquor is lawful under license, it would not be easy to convict a person charged with a violation of an ordinance prohibiting the possession of liquors for the purpose of unlawful sale, as it would be in a town or city where the sale of liquors was entirely prohibited. When the sale of liquor is entirely prohibited, its possession in such quantities, or at such places, as would be necessarily inconsistent with the idea of its being on hand for private consumption only, would be a strong circumstance tending to show that the possession was for the purpose of sale. * * * In a city where the sale of liquor would be lawful under license, the possession of any quantity in any place consistent with the license would not be even a circumstance to be considered by the court trying a person for having liquor in his possession for the purpose of sale contrary to the license laws."

This reasoning shows that license and prohibition are in a measure antitheses, and were so regarded, at least by the Georgia court.

(9) Bailey v. Raleigh, 130 N. C. 214, 41 S. E. 281, 58 L. R. A. 178.

(10) Paul v. Washington, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

(11) Paulk v. Sycamore, 101 Ga. 728, 30 S. E. 417.

Constitutional Provisions as to Caption of Legislation.—In a Michigan case,¹² it is said: "That the power to regulate is not power to prohibit has been many times decided (Black on Intoxicating Liquors, § 227, note 56), and it is admitted by counsel for the village that the power to suppress or prohibit is not power to license or regulate. The contention is that power to suppress the business in the village is power to suppress it in a part of the village; that the power to prohibit entirely implies and includes the power to prohibit some—to partly prohibit. This contention, although apparently plausible, cannot, in my judgment, be sustained. I am satisfied that the legislative intention is to give to villages the option to wholly interdict and prohibit the business within municipal boundaries. * * * There is not an option to both permit and suppress."

The court thereupon proceeds to speak of the enumeration of powers stated in the alternative and says: "This specific enumeration of powers is indicative of an intention to differentiate." And further along it is said: "An ordinance imposing a large license fee would probably result in suppressing all saloons in this village. No one will contend that such an ordinance could be sustained as an exercise of the power to suppress saloons. If it were matter merely of grave doubt whether the power to pass this ordinance exists, the application of the rule that the doubt should be resolved against the existence of the power would operate to avoid the ordinance."

In Iowa,¹³ where by statute towns were authorized to prohibit sale of intoxicating liquor and also to grant licenses for sale thereof, there was conviction under an ordinance for "regulating the use and sale of intoxicating liquors," but in the body of the ordinance, it was seen to be entirely prohibitory. It was said of the ordinance:

(12) Timm v. Caledonia Station, 149 Mich. 323, 112 N. W. 942.

(13) Cantril v. Sainer, 59 Iowa 26, 12 N. W. 753.

"Its whole scope is an absolute prohibition of the sale of any and all kinds of liquors." This was held invalid under constitutional provision regarding titles of acts expressing their subject-matter. It was said: "Instead of the title of this ordinance being a clear statement of its subject, it is wholly inconsistent with it and states a wholly different subject—as different as is regulation from prohibition."

While this is not absolutely determinative of the question in mind, namely the right to prohibit by an ordinance to license, yet it is pertinent as showing that an ordinance for licensing is confined to that subject or it is not an exertion of a conferred power to accomplish what is aimed at.

Difference Between Regulation or License and Prohibition.—In Kansas,¹⁴ it was held that where a city had the power "to enact ordinances to restrain, prohibit and suppress tippling shops," the power to "restrain" was not synonymous with that to "prohibit" or "suppress," and applying the rule in the Sainer case an ordinance to restrain would not include the purpose to prohibit or suppress. "It does not contemplate an absolute destruction of the business, but rather a placing it within bounds." This ruling seems not nearly as close as in a Missouri case,¹⁵ where it was held that a local option act prohibiting "sale" of intoxicating liquors did not cover the case of one making a gift of liquor as a matter of courtesy or hospitality, notwithstanding that it had been previously held, that where a gift was a mere subterfuge, in violation of law, it would be embraced.¹⁶

In Alabama,¹⁷ it was held violative of the constitution of that state for the title of an act intending only to prohibit sale for its body to forbid the giving away or otherwise disposing of liquors.

(14) Emporia v. Volmer, 12 Kan. 622.

(15) State v. Fulks, 207 Mo. 26, 106 S. W. 733, 21 L. R. A. (N. S.) 430.

(16) Ex parte Handler, 176 Mo. 383, 75 S. W. 920.

(17) State v. Davis, 130 Ala. 148, 30 So. 344, 89 Am. St. Rep. 28.

These cases seem illustrative of the point, that things regarded as distinct in their nature must not be confused in legislation and especially in ordinances of a city, a tribunal of conferred powers. However, they may be related to each other, in a general way, yet they must not be distinguishable as independent grants of powers.

Power to Regulate as Sustaining Regulation as to Screens and Blinds.—One of the leading cases regarding right of regulation and its extent is an Indiana case.¹⁸ There it was held that an ordinance of a city prohibiting the use of screens, blinds, stained glass or anything to obstruct the view of the interior of saloons, did not come under general authority to license and regulate them.

The court premises its discussion with the statement that municipal corporations are vested only with conferred powers and those incidental thereto and that what is not strictly within these limits is void. The statute under which this ordinance was enacted authorized cities "to regulate and license all places kept for the sale of liquors," and "to regulate all places where intoxicating liquors are sold to be used in the premises." In discussing this grant of power it was said: "The Legislature has not said here what distinct or particular acts may be done by the corporation. It has not said that municipal corporations may pass ordinances of the kind here involved. If it had, that would end the inquiry. As it has not, by the uniform current of authority, ordinances passed under such a general grant of authority must be reasonable, consonant with the general powers and purposes of the corporation and not inconsistent with the laws or policy of the state, otherwise it is the duty of the courts to declare them void."

Getting down to the ordinance as concerning the business of liquor selling, it

(18) *Champner v. Greencastle*, 188 Ind. 339, 35 N. E. 14, 24 L. R. A. 768, 46 Am. St. Rep. 390.

was referred to as one subject to regulation as an illegitimate business, but it was said legislation has not proceeded upon this idea, but upon a recognition of the business as legitimate, yet subject to restraint so as to lessen its evils. The ordinance therefore was held void, as not being conferred by express power or necessary implication therefrom. Surely if this is so, so much the more is it true, that an ordinance to regulate or to license does not include purpose to prohibit.

In a later case in Indiana,¹⁹ this case was approved, but the ordinance was held valid under express grant of power to cities to "divert the arrangement and construction" of doors, windows and openings of rooms where liquors are to be drunk.²⁰

It has been held that a power to prohibit, regulate or control the sale of liquor extended a general grant of power beyond what a general power to regulate embraced,²¹ but the court spoke *dubitante* as to a city's right to make it unlawful for any barkeeper, etc., to enter a saloon during Sundays, but as that did not appear clearly unreasonable, it was sustained. Here it is seen, that the fact that a business is harmful does not extend the principle of strict construction of conferred power to a municipal corporation.

Citation by Court of Authorities to the Principle of Prohibitive Legislation by means of License.—Later than the ruling in *Schwartz v. Gallup*, *supra*, the Supreme Court of New Mexico has confirmed the ruling in that case,²² citing as the only case opposed, the *Paulk* case, *supra*, and a number of cases as supporting its ruling.

Thus it cites in support a case by U. S. Supreme Court.²³ But that case only goes

(19) *Delphi v. Hamling*, 172 Ind. 645, 89 N. E. 308.

(20) See also *Greencastle v. Thompson*, 168 Ind. 493, 81 N. E. 497.

(21) *Paul v. Washington*, 134 N. C. 363, 47 S. E. 793, 65 L. R. A. 902.

(22) *Stalick v. Gallup*, N. M., 168 Pac. 707.

(23) *Phillips v. Mobile*, 208 U. S. 472, 28 Sup. Ct. 270, 52 L. ed. 578.

to the effect that under police power, sale of liquor may be either prohibited or regulated by the imposition of license. Who disputes that proposition? It was said in this case: "The higher the license, it is sometimes said, the better the regulation, as the effect of a high license is to keep out from the business those who are undesirable and keep within reasonable limits the number of those who may engage in it." This is not saying that license may be used as aiming at prohibition. On the contrary, the implication is the other way. If it aimed at monopoly, it would certainly be opposed to the genius of our institutions. And if it aimed at classification not reasonably based, it also would.

So also seems opposed a New York case that is cited.²⁴ This speaks of the double purpose in imposing a license "to discourage the business and to secure indemnity in part to the public from the losses and burdens which the business is likely to entail." If there is a "double purpose," there can be only a single purpose when it aims at prohibition, and if it is doubtful, whether one of these things may be disregarded, an ordinance of a municipality is to be declared void, because of conferred power being strictly construed.

Also is cited an Indiana case.²⁵ In that case a license was imposed by a city having the power "to tax, license and regulate distilleries and breweries." There was no attempt to prohibit and it would seem there was no right to prohibit. It was claimed the license was excessive and distinction was drawn between the liquor and other businesses, because the former was tolerated and therefore police power by means of license may "limit and discourage" it. This is far from saying a tribunal with conferred power may positively forbid it. On the contrary, this state has expressly declared

that the power to regulate the liquor business does not justify an ordinance "rendering it practically impossible to conduct it at all."²⁶

Also is cited a Missouri case.²⁷ This case concerned the validity of a liquor inspection act, and merely announces the principle that as there was power in the legislature absolutely to prohibit the sale of intoxicating liquors, it could impose any conditions or restraints upon such traffic as it saw fit. But this is far from saying, that when it confers power on a municipality to regulate, it also confers power to prohibit. This was discussion of an act of the legislature and not of an ordinance at all.

There are then cited a case from Wisconsin,²⁸ and one from Illinois.²⁹ The former of these cases concerned a statute "to regulate and license the keeping of dogs." The opinion justified the statute as of a kind with those authorizing imposition of license upon liquor selling, saying that thereby police power may "impose such sums for licenses as will operate as partial restrictions upon the business." I think this is an authority opposed to the court's ruling. "Partial restriction" is not total restriction. In the other case the grant of power was "to tax, license and regulate auctioneers, distillers, brewers, lumber yards, livery stables, public scales, money changers and brokers." An ordinance thereunder imposing a license on a brewer was assailed as not being reasonable, and it was denied that the police power of the city was limited to the imposition of a reasonable fee. None of the cases cited seem in point to the question before the court.

But there is also referred to R. C. L. Intox. Liquors, § 42. That section, in speaking of license, says that a license fee cannot be objected to "merely because it is large," but "this, however, does not imply

(24) *People v. Murray*, 149 N. Y. 367, 44 N. E. 146, 32 L. R. A. 344.

(25) *Schmidt v. Indianapolis*, 168 Ind. 631, 80 N. E. 632, 120 Am. St. Rep. 385, 14 L. R. A. (N. S.) 787.

(26) *Steffy v. Monroe City*, 135 Ind. 466, 35 N. E. 121, 41 Am. St. Rep. 436.

(27) *State v. Bixman*, 162 Mo. 1, 62 S. W. 828.

(28) *Tenny v. Lenz*, 16 Wis. 566.

N. E. 166.

(29) *U. S. Dist. Co. v. Chicago*, 112 Ill. 19, 1

that the power in this respect is unlimited. It is plain that the exaction of a fee so large as to be prohibitive or confiscatory, or to manifest an abuse of power, cannot be sustained." This subject in R. C. L. is treated under § 72, where it is stated, in effect, that the right to impose license fees may not be so unreasonable as to be prohibitive.

Conclusion.—It appears to me that the North Carolina court is sustained by textbook and authority, which appears to be the only case directly in point sustained by the principle of conferred power on a municipal corporation being strictly construed, and according to the case of Champner v. Greencastle, *supra*, if there is doubt, the ordinance in the Gallup cases ought to have been held void.

St. Louis Mo.

N. C. COLLIER.

LIMITATION OF ACTIONS—SET-OFF.

LUSCHER et al. v. SECURITY TRUST CO.
et al.

Court of Appeals of Kentucky. Jan. 10, 1918.

199 S. W. 613.

Where intestate had more than 15 years previous to her death paid a note as surety for her son, and the claim had become barred by the statute of limitations, other heirs and the administrator could not set off such claim as against the claim of the son to a share in the estate, since it was not a part of the same transaction, and not properly the subject of set-off, and, being barred in the hands of intestate, was barred in the hands of her estate.

CARROLL, J. There is one question of law presented by this record, and it is this: In the settlement of the estate of a decedent, can one of the heirs be charged with a debt due by him to the decedent that is barred by limitation? It comes up on this state of facts: Charlotte Stahel, in April, 1893, was compelled to and did pay a note for \$1,000 on which she was the surety of her son George C. Stahel. In 1916 Mrs. Stahel died intestate, and after her death one of her children brought a suit to settle her estate. In this suit it was charged, and stands admitted, that Mrs. Stahel paid, un-

der the circumstances stated, the \$1,000 note, and it was sought to set off this sum with interest from the date of its payment against the distributive share of George C. Stahel in the estate of his mother. George C. Stahel for defense relied alone on the statute of limitation in such cases made and provided, and the lower court held that the plea of the statute presented a good defense, and from that judgment this appeal is prosecuted by Emma Luscher, a daughter of Mrs. Stahel, who was plaintiff in the suit below.

It is admitted by counsel for Emma Luscher, the appellant, that as Mrs. Stahel paid this \$1,000 note in the ordinary course of her liability as a surety, an action by her, if she were living, to recover the amount so paid from George C. Stahel, would be barred if it had been brought when this suit was begun. But it is said that in a suit to settle the estate of a person who dies intestate, or in the settlement of an estate without a suit, the statute of limitation does not run against a debt or demand due by one of the heirs or distributees to the intestate, and that there may be deducted at any time from the share of the estate to which the heir would be entitled the amount of the debt or demand due by him to the intestate at the time of her death. So far as our investigation, which has been much aided by that of counsel in the case, goes, this question is a new one in this state, and curiously enough there are not many decisions of other courts directly in point.

If the sum paid by Mrs. Stahel for her son could be treated as an advancement, there could be no question that the son should be charged with it in the distribution of his mother's estate, because section 1407 of the Kentucky Statute provides, in part, that:

"Any real or personal property or money, given or devised by a parent or grandparent to a descendant, shall be charged to the descendant or those claiming through him in the division and distribution of the undevised estate of the parent or grandparent; and such party shall receive nothing further therefrom until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised."

There is, however, no contention that this indebtedness should be treated as an advancement within the meaning of the statute. On the contrary, it is affirmatively admitted that when Mrs. Stahel became liable as surety on the note of her son, and afterwards was obliged to and did pay the note, the ordinary relation of creditor and debtor was thereby established

between her and her son, and that she simply had a claim against him for the amount paid as his surety, the collection of which she might have enforced in the same manner that she could have enforced the collection of any other indebtedness. There being then no attempt to treat the matter as an advancement, and no evidence in the record on this subject, as the case went off on demurrer, the question recurs: Should the amount paid by the mother as surety, with interest thereon from date of payment, be deducted from the distributable share of George Stahel in the estate of his mother, although it was admittedly barred by the statute of limitation applicable to such demands, at the time of her death? Of course if this indebtedness had not been barred by the statute, there would be no difficulty in the way of setting it off against his distributable share.

Section 2514 of the Kentucky Statutes, fixing the period in which certain actions must be brought at 15 years from the date of their accrual, and section 2515, fixing 5 years as the time when certain actions must be brought after their accrual, are substantially the same in so far as the nature of the bar interposed by the statute is concerned, although a different period of time is fixed and the sections apply to different states of case. *Joyce v. Joyce*, 1 Bush, 474. It is therefore not material which one should be applied here; and as the cause of action in Mrs. Stahel to recover the amount paid as surety accrued when she paid the debt, which was more than 15 years before her death, we may, for the purpose of the case, look to section 2514, which provides, in part, that:

"Civil actions, other than those for the recovery of real property, shall be commenced within the following periods after the cause of action has accrued, and not after: * * * Upon a bond or obligation for the payment of money or property, or for the performance of any undertaking, shall be commenced within fifteen years after the cause of action first accrued."

But the argument is made that this statute merely precludes the maintenance of an action for affirmative relief if it is not brought within the prescribed time, but does not operate to defeat the assertion of a claim by the estate of an intestate against a distributee for the purpose of defeating or reducing the right of the distributee to participate in the estate, because as said by counsel for the estate, this character of relief is negative in its nature and not embraced by the statute, which does not put an obstacle in the way of the estate's retaining at any time out of the share of a distributee a debt due by him to the estate.

We do not, however, find ourselves able to agree with counsel in the soundness of the distinction attempted to be made. If the estate of Mrs. Stahel had sought to collect by action from George Stahel the amount paid by his mother as surety, there could be no question about his right to plead and rely on the statute in bar of the action, and as he could defeat the collection of the demand by interposing the statute of limitation, there seems to be no good reason why he should not also be permitted to plead and rely on the statute when the attempt is made to collect the demand by deducting it from his share of the estate. So far as the rights of the estate and the rights of George Stahel are concerned, the collection of the demand by an independent action, or the collection of it by deducting the amount from his portion of the estate, would have precisely the same effect, as in either event the estate would get the money. It is therefore plain that if the distinction sought to be made applicable is controlling, the statute must be ignored, because it makes no distinction between the right to collect a demand due an estate by an independent action and the right to collect it by deducting the amount from the share of the estate going to the debtor.

It is said, however, that in *Aultman & Taylor Co. v. Meade*, 121 Ky. 241, 89 S. W. 137, 123 Am. St. Rep. 193, 28 Ky. Law Rep. 208, *Weakley v. Meriwether*, 156 Ky. 304, 160 S. W. 1054, and in other cases therein cited, this court has held that the statute of limitation can be successfully pleaded only to an action asserting affirmative relief, and is not available as a mere defensive plea. But the cases in which this rule was announced presented states of fact in which it was sought to defeat by plea of limitation the right of the defendant to assert by way of counterclaim transactions connected with and growing out of the matter that was the basis of the suit, and the rule that in such cases the statute of limitation will not operate to bar the defense is well illustrated in the *Meade Case*. There the Aultman & Taylor Company had sold Mead a sawmill, and in a suit by the company to collect its debt, Meade set up as a defense the value of the sawmill that he alleged the company had taken possession of and converted to its own use. The company interposed a plea of limitation to this defense, but the court held that the statute was not available, saying:

"If such mortgagee, by virtue of his mortgage contract, and not as a tort-feasor, takes the mortgaged property to be applied upon the mortgage debt, is it not his agreement, as part

of the mortgage contract, to so apply it? And if he fails to do so, is not that a matter purely of defense in a suit to recover the balance of the mortgage debt, as much as would be a plea of payment? We think it is. Having reached this conclusion, the disposal of the plea of limitation becomes simple."

But here there is no connection whatever between the claim of George Stahel to his distributive part of the estate and the demand asserted by the estate against him on account of the payment of the surety debt. These two matters are separate and distinct, not arising out of the same contract or transaction. In other words, the indebtedness sought to be deducted by the estate was in the nature of a set-off, and it has been held in *Williams v. Gilchrist*, 3 Bibb, 49, and *Hawthorne v. Roberts, Harding*, 75, that:

"A debt, to be pleadable as a set-off, must be a mutually subsisting debt at the time of bringing the suit. But a debt barred by the statute of limitations is not a subsisting debt, and so cannot be pleaded as a set-off or given in evidence."

We are also referred to *Brown's Adm'r v. Mattingly*, 91 Ky. 275, 15 S. W. 353, as sustaining the right of the estate to deduct this indebtedness, but this case, while it recognizes the right of an administrator to plead as a set-off a distributee's indebtedness to the estate against the distributee's interest therein, does not hold or even intimate that the right to plead the indebtedness as a set-off would be available if the debt due by the distributee were barred by limitation. Of course where the claim of the estate against the distributee is not barred by limitation, and is a valid and subsisting debt against the distributee, there can be no doubt about the right of the estate to rely on the claim as a set-off against the distributee's interest. It should, however, be said that the contention of counsel for the estate that the statute does not bar the right to deduct from the share of a distributee or legatee a debt due by him to the estate is supported by *Williams on Executors*, vol 2, p. 619, where it is said:

"An executor may retain so much of the legacy as is sufficient to satisfy a debt due from the legatee to the testator, although the remedy for such debt was at the time of the death of the testator barred by the statute of limitation."

But this text finds its principal support in English cases, although, as said by Woerner on American Law of Administration (2d Ed.) vol. 2, § 564, the same doctrine is held by some American courts, and he refers to the cases of *Wilson v. Kelley*, 16 S. C. 216, *Holmes v. Mc-*

Pheeters, Adm'r, 149 Ind. 587, 49 N. E. 452, and *Tinkham v. Smith*, 56 Vt. 187. It should, however, be observed that in some of these states the subject is regulated by statute, and in others the courts treated the indebtedness of the heir or legatee as an advancement. But opposed to the English rule referred to by Williams on Executors is *Allen v. Edwards*, 136 Mass. 138, where the court held that a debt due from a legatee to the testator, which was at the time of the testator's death barred by the statute of limitation, could not be deducted from the legacy, unless the language of the will clearly showed that the testator intended that such deduction should be made.

In *Holt v. Libby*, 80 Me. 329, 14 Atl. 201, the question was clearly presented to the court, and it was held that the executor could not deduct from a legacy a debt due by a legatee to the estate which was barred by limitation, the court saying:

"The estate is just as much of a debtor to the indebted legatee as the legatee is to the estate. Each has a legal right and remedy, and the statute-barred debt is not more recoverable by the estate than by any other creditor. To our minds, this is the better doctrine."

In the case of *Light's Estate*, 136 Pa. 211, 20 Atl. 536, 537, the same rule was announced, the court saying:

"If the statute can be pleaded with effect when the decedent's estate is a debtor, we can see no good reason why it may not be pleaded also with like effect when the estate is a creditor; if the running of the statute should be stopped by the death in one case, why not in the other? There is no necessity arising out of the administration of the law, or the practice in equity, which calls for any such distinction; the legatees were as much entitled to the protection of the statute as any other creditor. Admitting the right of an executor, or of the heirs, in the distribution of a decedent's estate, to set off the debts of the legatees against their legacies, the debts, to constitute a valid set-off, should be valid, subsisting debts, not barred by the statute."

In *Richardson v. Keel*, 9 Lea (77 Tenn.) 74, the court said:

"We do not perceive the principle upon which it can be held that while suit upon the claim is barred by the statute, so that there can be no judgment or recovery upon it, yet the administrator may appropriate the effects of the defendant, which he holds in trust for him, to the payment of the barred debt."

To the same effect are *Boden v. Mier*, 71 Neb. 191, 98 N. W. 701; *Kimball v. Scribner*, 174 App. Div. 845, 161 N. Y. Supp. 511.

Having no statute in this state making any exception referable to claims asserted by an estate against a distributee, we are disposed to the view that the general statute of limi-

tation is as applicable in this class of cases as it is in others. It may be true, as urged by counsel for the estate, that to allow George Stahel to get his full distributive share of the estate, while denying the estate the right to deduct his indebtedness, would be unjust to the other heirs and distributees; but if so the injustice was not worked by the law but by the failure of Mrs. Stahel to collect or attempt to collect her debt before it was barred by the statute, or to put it, as we may assume she might easily have done, in such form as that its life would have been extended. But at least there is no more injustice in allowing the statute to defeat a meritorious claim like this than there is in allowing it to defeat the collection of other just demands, as is often done.

The judgment is affirmed.

Note.—Bringing into Hotchpot Advancements Barred as Demands by Statute of Limitations.—To me it seems that the rule declared by the instant case is one of injustice. A statute of limitations is merely a statute of repose. The moral obligation remains and the defense may be waived. An advancement is not made on the theory of creating a demand against the heir. It is more like a gift subjecting the donee to the principle of equality in final distribution. By relation forward it brings possession of what has been previously received down to the time of final distribution, with implied obligation to account for permissive use in advance by way of interest on such use. There seems or may seem some opposition to this theory in the peculiar facts in the instant case, but this does not seem to me important, if as a matter of fact the payment as surety might be considered an advancement at all. For example, the surety might recover from the principal a different interest, under the contract, than what might be charged for the use of an advancement. Even, however, if an advancement may be sued for this is a matter of election by donor.

Now let us see the cases supporting the view, that a statute of limitations does not apply where advancements are brought into hotchpot.

But in many states it has been ruled that interest on the advancement between its making and the death of donor is not to be computed, because this would be to convert the gift into a loan. *Conner v. Shehee*, 129 Ala. 588, 30 So. 95, 87 Am. St. Rep. 78; *Clark v. Helm*, 130 Ind. 117, 29 N. E. 568, 14 L. R. A. 716; *Tart v. Tart*, 154 N. C., 502, 70 S. E. 529, Ann. Cas. 1912 A. 952.

In *Osgood v. Breed*, 17 Mass. 358, it was said: "It would be entirely contrary to the character of an advancement, that it should be viewed in the light of a debt upon interest. The very claim in this case proves that such could not have been the intention of parent or child. Fifty-six years elapse from the time of the advancement to the settlement of the estate in the probate office; to that the interest if allowed would amount to nearly four times as much as the sum advanced. If this allowance could be

made, few children would be willing to take an advancement and run the hazard of having their estates swallowed up by it, as might frequently happen."

It occurs to me that charging interest to donee would militate against equality, because had no advancement have been made the use of it by donor would presumptively have greatly increased his estate for final distribution. If donee is charged interest the contribution falls on him alone.

A later case is *Allen v. Edwards*, 136 Mass. 138, where it was held that a debt due by legatee barred at the time of testator's death, could not be deducted from his legacy, unless the will showed clearly it was to be deducted. But that was a case where the Massachusetts court was construing a statute and not where a court acts upon the general principles of equity. It was thought that the right to sue for a legacy under statute made the matter altogether different. We think this is not to change the relation between testator and legatee, but merely between the latter and executors who hold in trust. Besides, advancement to a legatee and to a child or heir stands differently or may so stand.

In *Kimball v. Scribner*, 161 N. Y. Supp. 511, 174 App. Div. 845, New York Supreme Court in Appellate Division, there is admission that several prior rulings by such division had recognized the English chancery rule, that the statute of limitations was not to be regarded in favor of a legatee, but it was said there are authorities in other jurisdictions opposed. As no Appeals Court decision was found in New York, this case seems to have regarded itself as not bound to follow prior decision, and it refused, wherein an action at law the defense was set up. I do not think that in this country there is the difference between remedies at law and those in equity that obtained in England. It is the right of the matter on whatsoever rule of the court that is looked to. If a rule existed in England in equity as enforcing a rule of right, that rule of right would be given effect here, though it might be denied enforcement there in a court of law. Many states expressly declare, that there are not two sides—equity and law—but cases are determined according to the facts, notwithstanding that in one case the old machinery or processes in equity or common law, as the case may be, are used in a remedial way. It is only as to remedies that rules are technical; not as to substantial justice.

C.

BOOK REVIEW

COLLIER ON PUBLIC SERVICE COMPANIES,
1918.

A new book in the field of public utilities is that under the title, "Public Service Companies," by Needham C. Collier, LL. D., of the St. Louis bar, formerly a judge of the Supreme Court of New Mexico, at present Editor-in-Chief of the Central Law Journal.

The work begins with an exposition of the common law regarding a service as to which, under franchise of the Crown, there has been a common charge, with that charge to be reasonable and demandable by all properly applying for the service, and as to common carriers and innkeepers, regulated in England under police power.

In early colonial days, as this book shows, this practice and duty received recognition both explicitly and implicitly and in early legislation soon after our colonies became states of the Union. Oft in decision it was shadowed forth, especially in recognition of the limited monopoly arising out of special privilege with correlative obligation under common law principle. It remained, however, for statute to extend this rule.

In the early seventies of the nineteenth century this extension began to take on concrete form, as instance the beginning of state commission laws regarding the great modern highways—the railroads. Especially notable, however, was the Illinois statute regarding warehouses, their regulation and rates. Challenge of this statute evoked the great case of *Munn v. Illinois*, 94 U. S. 113, in which the principle declared by Lord Hale regarding ports and wharves was held applicable, these warehouses exercising what was held to be a virtual monopoly at a port of departure for the great grain regions of the northwest.

From the time this case appeared a nebulous something in our jurisprudence took shape under the skillful hand of Chief Justice Waite, and lawmakers and judges began spelling out its possibilities and applying it to various enterprises depending on favors in franchises and on exercise of the right of eminent domain. Finally the police power, as for example, in insurance, added its contribution to the swelling tide of the rule of regulation.

Elsewhere no more interesting development in our jurisprudence than in this has appeared, and Mr. Collier has attractively presented its growth. Furthermore, he has made manifest the practical necessity for its study by the practitioner, as well as by the student, his discussion being buttressed by authority from all of the courts, federal and state. His effort is a veritable treatise, logical in arrangement, and of easy reference by aid of his table of cases and well constructed index. The story of the rise and development of public utilities regulation reads like a romance in the law and its decline is far distant.

To the text there is added an annotated appendix of procedural sections of state commis-

sion laws, especially useful to local practitioners, in connection with the main text.

The work is attractive in its binding of law buckram, and comes from the well known law book house of F. H. Thomas Law Book Company, St. Louis.

C. P. BERRY.

HUMOR OF THE LAW.

The face of the young man was rueful, and the lawyer he was interviewing looked exceedingly grave. It was a clear case of breach of promise, and the man of law could see nothing but heavy damages as the ultimate outcome. And he read the riot act to some purpose to the young man, who waxed restive.

"Oh, yes," he said, impatiently, "I know all about it. The same old song, 'Do right and fear nothing.'"

"No, no; that's not it at all," said the old lawyer, smiling shrewdly. "What I meant to impress on you was, 'Don't write and fear nothing.'"—*Rochester Evening Times*.

Two Massachusetts towns were building a bridge jointly and a joint town meeting was being held to arrange the distribution of the financial burden. Naturally every man from Blakely was bound to look keenly after the interests of his own town, and nobody from Peru could permit Blakely to put anything over. Words were exchanged between the watchdogs of the treasury on either side. Motives were questioned. In short, there was language. One of those present, speaking with asperity and emphasis, said: "I'd rather be the meanest man in Blakely than the leading citizen of Peru." Whereupon a selectman of Peru replied: "Well you've got your rather."

Former President Taft, during his recent visit to Texas, said at a dinner:

"There is a story which illustrates the importance of keeping our Judges out of business or trade.

"It's a story about a Magistrate who was a flour and feed dealer. A farmer was brought before the man for failing to notify a case of cattle disease. The Magistrate delivered judgment as follows:

"'You are fined \$5 for this offense, with \$2.50 costs, making \$7.50 and \$9 you owe me for your last bill of feed, or \$16.50 in all—\$16.50 or 30 days.'—*Detroit Free Press*.

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
Last Resort and of ALL the Federal Courts.**

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2. **Adoption—Inheritance.**—In Rev. St. 1909, § 1671, authorizing adoption of a "child" as the "heir" of the adopting parent, the quoted words include, under statute of descents and distributions, transmission of the faculty of inheritance by the child's death.—*In re Cupples' Estate*, Mo., 199 S. W. 556.

3. **Assault and Battery—Collision.**—That driver of automobile was violating speed ordinance when he collided with another automobile, held not in itself to make him guilty of assault.—*People v. Hopper*, Colo., 169 Pac. 152.

4. **Assignment for Benefit of Creditors—Management.**—Where trustee for creditors employed insolvent debtor to manage property, such fact did not destroy legal transfer of property to trustee or permit creditor by obtaining judgment and levying execution to secure payment of his debt in full.—*Meakim v. Ludwig*, Wash., 169 Pac. 24.

5. **Attachment—Desert Claim.**—Attachment on desert claim before entryman has complied with all preliminary acts prescribed by law for acquisition of title thereto creates no valid lien on entryman's inchoate right or after title is

acquired.—*Stockman's Nat. Bank of Ft. Benton v. Hofeldt*, Mont., 169 Pac. 48.

6. **Attorney and Client—Appointment.**—As attorney of infant suing by next friend derives authority solely from next friend, he is not clothed with authority to receive payment of judgment in favor of infant and satisfy same.—*Paskewie v. East St. L. & S. Ry. Co.*, Ill., 117 N. E. 1035.

7. **Attorney and Client—Compensation.**—Where administratrix, suing for death of deceased for benefit of widow, agreed to pay per cent. of recovery to attorney, and widow compromised case, attorney is only entitled to percentage based on amount received by widow, and issue of damages cannot be litigated for purpose of allowing recovery of percentage of amount thereof.—*Davis v. New York Cent. & H. R. R. Co.*, N. Y., 167 N. Y. S. 668.

8. **Private Detective.**—If an attorney, hiring a private detective, acts on behalf of his client, whom he discloses, without assuming liability, the attorney is not personally liable to pay for such services.—*Riley v. Tull*, N. Y., 167 N. Y. S. 918.

9. **Bailment—Burden of Proof.**—Where plaintiff left a suit of clother with defendant to be cleaned, and defendant's shop was broken into and the suit stolen, plaintiff, suing for its value, had burden of showing some negligence on part of defendant.—*Lewis v. Troiani*, N. Y., 168 N. Y. S. 48.

10. **Notice of Lien.**—Where repairer was given an automobile for a complete overhauling and the owner permitted to use it before it was tested in the usual manner and the owner returned it and requested more work to be done on it, the machine was not delivered within L. O. L. § 7498, relating to time for filing notice of lien after delivery, until the work was completed.—*Pierce Arrow Sales Co. v. Irwin*, Ore., 169 Pac. 129.

11. **Relationship.**—Where a railroad allowed a servant to place household goods in a shanty car and live there, it is not liable as a bailee of such goods when destroyed by a flood.—*Matthews v. Carolina & N. W. Ry. Co.*, N. C., 94 S. E. 714.

12. **Bankruptcy—Trustee.**—Bankruptcy trustee is not estopped from recovering corporate funds diverted to paying private debts of officers by alleged consent of directors and stockholders since trustee also represents corporate creditors.—*McCullum v. Buckingham Hotel Co.*, Mo., 199 S. W. 417.

13. **Banks and Banking—Cashier.**—Where a cashier of a bank discounts a note and converts part of the proceeds to his own credit instead of the credit of the maker, the bank is liable.—*Phillips v. Hensley*, N. C., 94 S. E. 673.

14. **Draft.**—Where draft with bill of lading attached is indorsed to bank for collection, it is entitled to receive remittance and give full acquittance to those paying draft.—*Bank of Madrid v. Merchants' Nat. Bank of Middletown*, Ala., N. Y. 77 So. 167.

15. **Notice.**—Where the director of a creditor bank, while not representing the bank,

prepared a resolution for a corporation, he is not presumed to have informed the bank of what he ascertained in the transaction, being under no obligation to do so.—*Watt v. German Sav. Bank, Iowa*, 165 N. W. 897.

16.—**Trover.**—Payee of bank check may maintain trover against drawee bank, which pays the check to an unauthorized person, who falsely represents himself to be the payee's agent to indorse check and receive the proceeds.—*Louisville & N. R. Co. v. Citizens' & Peoples' Nat. Bank of Pensacola, Fla.*, 77 So. 104.

17. **Bills and Notes—Corporation.**—Where a bank lends money solely on the credit of the officers of a corporation receiving notes signed by such officers individually and not by the corporation, such notes are not obligations of the corporation, although it used the money and the amount was carried on its books as bills payable.—*Watt v. German Sav. Bank, Iowa*, 165 N. W. 897.

18.—**Filling Blanks.**—Where one signs a note in blank and gives it to another, who fills in the name of the payee and the amount, the signer is liable on the note to any holder in good faith.—*Phillips v. Hensley, N. C.*, 94 S. E. 673.

19.—**Payment.**—Where bank intentionally and uninfluenced by fraud accepted the check of a depositor on his account with it in payment of another's note, which was canceled, marked "Paid," and surrendered to depositor, and the check was charged against the depositor's account and stamped "Paid," the note maker's obligation was discharged.—*Broad & Market Nat. Bank of Newark v. New York & Eastern Realty Co., N. Y.*, 168 N. Y. S. 149.

20. **Carrier of Goods—Estoppel.**—Estoppel is not available as a defense to action for balance of freight for interstate shipment, part of which only, through mistake in computation, was collected on delivery.—*Bush v. Keystone Driller Co., Mo.*, 199 S. W. 597.

21.—**Monopoly.**—Pipe line companies, owning oil fields, and transporting only oil products thereof, or purchased by them from other producers for the operation of their own business, not constituting a monopoly of the transportation, are not common carriers of oil, within Const. art. 12, § 23, or St. 1913, p. 657, and need not file schedules of rates with the railroad commission.—*Associated Pipe Line Co. v. Railroad Commission of California, Cal.*, 169 Pac. 62.

22.—**Refrigeration.**—Where precooking of refrigerator cars took place after delivery of fresh vegetables to carrier, negligence in precooking and icing cars is attributable, not to shipper, but to carrier.—*Wells Fargo & Co. v. Sprague, Tex.*, 199 S. W. 657.

23. **Carriers of Passengers—Alighting From Car.**—Where street car is slowed down within few feet of its regular stopping place, it is not negligence on part of carrier to permit passenger apparently in full possession of his physical and mental faculties to step off car.—*Gipson v. Shreveport Traction Co., La.*, 77 So. 129.

24.—**Baggage.**—Where passenger's suit case containing baggage, as defined by Railroad Commission, was delivered for transportation, but articles were not found in it when suit case was returned to passenger, railroad was liable for value.—*Texas & N. O. R. Co. v. Levy, Tex.*, 199 S. W. 513.

25.—**Baggage.**—Despite statute regulating railroad passenger's allowance of baggage, under statute creating Railroad Commission, held that commission had power to classify baggage, and to fix what articles shall constitute such for transportation, determining it shall consist, among other things, of articles carried as samples by traveling salesmen.—*Texas & N. O. R. Co. v. Levy, Tex.*, 199 S. W. 513.

26.—**Mileage Ticket.**—Where plaintiff purchased from defendant's agent mileage book having stamped thereon that it would not be good over certain line, defendant was not liable for refusal of such line to accept coupons, although defendant's agent represented that coupons were good over such line.—*Alabama Great Southern R. Co. v. Vermillion, Ala.*, 77 So. 67.

27. **Commerce—Employes.**—Congress intended by legislation on liability of railroads for injury to employes in interstate commerce to take exclusive control in order to make liability uniform throughout United States, and it is to be determined by provisions of legislation itself and general common law as administered by federal courts.—*Panhandle & S. F. Ry. Co. v. Brooks, Tex.*, 199 S. W. 665.

28. **Constitutional Law—Speed Laws.**—Ordinance of St. Louis prescribing maximum speed for automobiles of eight miles an hour in business districts and ten miles elsewhere is not invalid as denying equal protection of the laws.—*City of St. Louis v. Hammond, Mo.*, 199 S. W. 411.

29. **Contracts—Exclusive Rights.**—Where the plaintiff, who possessed a business organization adapted to the placing of such designs and indorsements as plaintiff might make or approve, entered into agreement for exclusive right to handle and sell all such or license others to market them, and take out copyrights, and in return defendant was to have one-half of "all profits and revenues" to be accounted for monthly, an agreement that plaintiff would use all reasonable efforts to market such indorsements and designs was implied, and the contract is not void for want of mutuality and consideration.—*Wood v. Lucy, Lady Duff-Gordon, N. Y.*, 118 N. E. 214.

30.—**Illegality.**—Where, pursuant to agreement that plaintiff, a married man should divorce his wife and marry defendant, plaintiff advanced money and performed services for defendant, transaction was illegal, parties indulging in immorality, so notes given by defendant to reimburse plaintiff, defendant refusing to consummate agreement, are tainted with illegality.—*Olson v. Saxton, Ore.*, 169 Pac. 119.

31.—**Repairs on Property.**—Owner of motorboat which plaintiff repaired under contract with third person in possession is not by reason of mere fact of his ownership liable for repairs.—*Miller v. Fisher, Miss.*, 77 So. 151.

32. Corporations—Burden of Proof.—Defendant admitting that he received corporate checks drawn by officer in payment of private obligations has burden of showing such officer's authority to draw upon corporate funds for private purposes.—*McCullam v. Buckingham Hotel Co.*, Mo., 199 S. W. 417.

33.—Consideration.—Where a stockholder assumes the indebtedness of a corporation in return for a large amount of the stock of a new corporation to be formed, the issuance of some such stock direct to others, who paid nothing therefor, with such stockholder's consent, was not without consideration as to creditors of the new corporation.—*Watt v. German Sav. Bank*, Iowa, 165 N. W. 897.

34.—Transfer of Stock.—Where a corporation negligently allows its stock, duly made out to an individual, to fall into the hands of the individual, who pledges it to a bona fide pledgee for value, the latter acquires title as against the corporation.—*American Nat. Bank v. Dew*, N. C., 94 S. E. 708.

35.—Watered Stock.—“Watered stock” or fictitiously paid-up stock is stock which is issued as fully paid-up stock, when in fact the whole amount of its par value has not been paid; stock purporting to represent, but which does not in good faith represent, money paid into corporation's treasury, or money's worth actually contributed to its capital.—*Lee v. Cameron*, Okla., 169 Pac. 17.

36. Damages—Evidence.—In action by passenger for damages for being directed to take the wrong train, in consequence of which she was compelled to remain all night in a town not her home, she could not recover for the inconvenience or damages suffered from remaining all night in the depot, where she declined offers of railroad's agents to take her to a hotel or send her home in an automobile.—*Southern Ry. Co. v. Prueett*, Ala., 77 So. 49.

37. Deeds—Heirs.—As a living person has no heirs a deed to the heirs of a living person is, where there was nothing to show that children were intended by the use of the word heirs, a nullity.—*Kepler v. Castle*, Ill., 117 N. E. 1029.

38. Eminent Domain—Due Process of Law.—Subjecting property of a pipe line company to the use of the public in the common carriage of oil constitutes a “taking” thereof and requires just compensation.—*Associated Pipe Line Co. v. Railroad Commission of California*, Cal., 169 Pac. 62.

39. Estoppel—Injunction.—Where creditor accepted indorser upon debtor's representation that indorser owned realty, and found record title to be in indorser, though he had previously conveyed it by unrecorded warranty deed, grantee owed creditor no duty to record it, and was not estopped to enjoin execution sale on creditor's judgment against indorser.—*Culp v. Klene*, Kan., 168 Pac. 1097.

40. Executors and Administrators—Temporary Administrator.—An administrator ad litem defending disputed claim has the same authority to stipulate as to fees advanced in defending estate against claim which he was appointed to defend, that an executor or administrator would have in defending against claim by any

person other than executor or administrator.—*In re McManus' Estate*, Mo., 199 S. W. 422.

41. Executors and Administrators—Will Contest.—The fact that a will is still open to contest at suit of minor or non-resident does not necessarily preclude distribution where the other heirs have made an agreement for distribution under which a sufficient amount will be retained by one heir to pay the claim of the contestant should he succeed.—*In re Hinkel's Estate*, Cal., 169 Pac. 70.

42. Exemption — Family.—Six unmarried brothers living in the same house with their four unmarried sisters and with their aged, widowed father, who was unable to perform labor of any kind, constituted “family” within exemption laws.—*Kiggins v. Henne & Meyer Co.*, Tex., 199 S. W. 494.

43. False Imprisonment—Scope of Duty.—Special city policemen, employed by a railroad to prevent theft and make arrests, acted within the scope of their employment in arresting plaintiff, who was ejected from a train for having no ticket, when they did so at the request of the conductor, though without direction from the railway.—*Hobbs v. Ill. Cent. R. Co.*, Iowa, 165 N. W. 912.

44. Fraud—Guilty Knowledge.—That seller failed to use reasonable care and observation to ascertain whether his statements were false would not justify jury finding that false representations were made with knowledge of their falsity.—*Boyd v. Buick Automobile Co.*, Iowa, 165 N. W. 908.

45. Fraudulent Conveyances—Bulk Sales Law.—The holder of a series of notes is not a “creditor,” within the Bulk Sales Act, of an accommodation indorser as to notes maturing after a transfer of his property in bulk, although at the time of paying some which had previously matured some of the subsequent notes had matured.—*Adams-Flanigan Co. v. Baseline*, N. Y., 167 N. Y. S. 948.

46. Homestead—Husband and Wife.—A homestead right attaches to land obtained under a contract of purchase where the purchaser and his wife occupy it as a residence, and a new contract modifying contract of purchase and a lease executed between seller and purchaser, not signed by or consented to by wife, were void.—*Walz v. Keller*, Kan., 169 Pac. 196.

47. Homicide—Violation of Ordinance.—Where auto truck driver approached intersecting street in city without slowing down or giving any signal, at 30 miles an hour, in violation of law of state (Law 1913, c. 107) and ordinance of city, and killed a boy, he was guilty of manslaughter.—*State v. McIver*, N. C., 94 S. E. 682.

48. Innkeepers—Rules and Regulations.—A hotel keeper's rule prohibiting a man from visiting a woman in her room without permission, held no defense to an action against the hotel keeper for damages because of a charge of immorality, where hotel keeper knew that the charge was unfounded.—*Boyce v. Greeley Square Hotel Co.*, N. Y., 168 N. Y. S. 191.

49. Insurance—Execution of Contract.—Accident insurance company cannot defeat action on policy because of stipulations or admissions contained in application which insured at instance of insurer's agent signed without reading or knowledge of its contents.—*Shinn v. National Travelers' Ben. Ass'n*, Kan., 169 Pac. 215.

50.—Recovery.—Recovery on policy was barred by noncompliance with bookkeeping requirements of iron-safe clause, where from records surviving the fire, unaided by insured's memory, it could not be ascertained of what his stock consisted.—*Fidelity Phoenix Ins. Co. v. Williams*, Ala., 77 So. 156.

51. Intoxicating Liquors—Criminal Law.—Under Laws 1909, p. 17, § 25, it is a misdemeanor to deliver intoxicating liquor to any person in any prohibited district, without regard to whether the liquor is intended for sale, or merely for personal use, and notwithstanding the fact that the act does not make mere possession a crime, nor does the fact it was interstate shipment alter the rule.—*Kirtley v. Oregon Short Line R. Co.*, Idaho, 169 Pac. 172.

52. Joint Adventures—Accounting.—Widow and administratrix of dramatist held entitled to accounting as against defendant, who engaged in joint adventure with deceased to write play, and who, on co-author's death, appropriated it, and with co-operation of producer, produced it, in disregard of widow's rights.—*Ongley v. Marcin*, N. Y., 168 N. Y. S. 30.

53. Landlord and Tenant—Waiver.—Where lessee of hotel, who was not to underlet without lessor's written consent, temporarily rented a room to a printer without such consent, the lessor, by previously telling printer that he had no objection, waived right to terminate lease because of underletting.—*Norris v. McKee*, Kan., 169 Pac. 201.

54. Larceny—Intent.—If defendant took possession of a hog for the purpose of protecting his crop and the original taking was not fraudulent, his subsequent appropriation or killing of the hog was not larceny.—*Brooks v. State*, Tex., 199 S. W. 472.

55. Libel and Slander—Instructions.—Alleged oral charge of treason, made when United States was at peace, could not have been intended to charge plaintiff with adhering to any enemies of United States, or of giving them aid and comfort, and could not have been so understood by the hearers.—*Kegerreis v. Van Zile*, N. Y., 167 N. Y. S. 874.

56.—Injury to business—Newspaper.—Newspaper, which published report that case of infantile paralysis came from street number where plaintiff was sole tenant, held not liable to plaintiff for injury to business.—*Stanger v. Sun Printing & Publishing Ass'n*, N. Y., 168 N. Y. S. 266.

57. Mandamus—Inspection of Records.—Assuming common-law right of director to inspect corporate books and records was denied by agents, his proper, if not the only adequate remedy is mandamus.—*Leach v. Davy*, Mich., 165 N. W. 927.

58. Master and Servant—Course of Employment.—Employee of garbage reduction company, who, while loading "tankage" into cars, went upon the roof of building and, while attempting to pull down a rope used in hoisting materials, fell through the skylight and was killed, suffered an "injury in the course of his employment" within Workmen's Compensation Act.—*Ross v. Genesee Reduction Co.*, N. Y., 168 N. Y. S. 51.

59.—Dependency.—Under Workmen's Compensation Act of 1913, married daughters who were not dependent on their father, but to whom he had contributed groceries and other things, were entitled to compensation for his death.—*Peabody Coal Co. v. Industrial Board of Illinois*, Ill., 117 N. E. 983.

60.—Dependency.—Under Workmen's Compensation Act § 7, par. (b), where watchman left daughter of 22 surviving, to whose support he had contributed within 4 years, she being unable to earn living from sickness, so it was his duty to support under Hurd's Rev. St. 1915-16, c. 107, § 1, employer owed daughter compensation.—*Mechanics' Furniture Co. v. Industrial Board of Illinois*, Ill., 117 N. E. 986.

61.—Dependency.—Under Laws 1913, p. 340, § 7, par. "b," providing for compensation if deceased leaves any widow, child, parent, grandparent, or other lineal heir to whose support he has contributed, it is not necessary that a father be dependent upon his son in order to entitle him to compensation.—*Mallers v. Industrial Board of Illinois*, Ill., 117 N. E. 1056.

62.—Dependency.—Under Workmen's Compensation Act, § 29, providing for election between remedies when employee is injured or killed by another's negligence, and for subrogation if compensation is paid, a widow with dependent child may, for herself and child, make an election.—*Hanke v. New York Consol. R. Co.*, N. Y., 168 N. Y. S. 234.

63.—Evidence.—In action for injuries to transfer company's teamster who tripped over nail in bed of wagon from which cleats had been removed, evidence of nailing cleats on some of defendant's wagons without connecting it in any way with wagon plaintiff used was admissible.—*Peetz v. St. Louis Transfer Co.*, Mo., 199 S. W. 433.

64.—Emergency.—Where a blacksmith, working on a mountain side, was suddenly called to by his helper to "look out," and heard a tree which had been felled by his employer's servants further up the mountain coming down, and being frightened, jumped over a bank, sustaining injuries, he would not be held to the degree of responsibility of one who has time for reflection.—*Hargis v. Knoxville Power Co.*, N. C. 94 S. E. 702.

65.—Fellow Servant.—A section foreman, with power to hire and discharge men and to direct section laborer, is not a fellow servant of laborer as to condition and safety of tools and appliances under his care.—*Carnahan v. Chicago, B. & Q. R. Co.*, Neb., 165 N. W. 956.

66. Mandamus—Franchise Duties.—Whenever corporation accepts municipal franchise imposing certain obligations toward public in consideration of rights conferred, it may be compelled by mandate to perform such franchise duties.—*State v. Vincennes Traction Co.*, Ind., 117 N. E. 961.

67. Master and Servant—Hazardous Occupation.—Village employee, injured on leaving truck, not operated by village, on which he rode part of way to depot, where he was going to get lead pipe for water pipe work, was not engaged in hazardous occupation.—*Spinks v. Village of Marcellus*, N. Y., 168 N. Y. S. 69.

68.—Hazardous Occupation.—Employe, whose sole duty was to feed bundles into combined thresher and cleaner, was neither engaged in hazardous employment of "milling," within Workmen's Compensation Act, § 2, group 29, nor of "operating vehicle," within group 41.—*Vincent v. Taylor Bros.*, N. Y., 168 N. Y. S. 287.

69.—Hazardous Occupation.—Where company in nonhazardous employment hired carpenter by hour to put in shelving, who, when at work, was injured, employer was not liable to pay compensation, under Workmen's Compensation Act.—*Geller v. Republic Novelty Works*, N. Y., 168 N. Y. S. 263.

70.—Notice.—In female employee's proceedings for compensation under Workmen's Compensation Act, evidence held insufficient to sustain State Industrial Commission's finding that insurer and employer were not prejudiced by claimant's failing to give written notice of injury within 10 days after disability, as required by Workmen's Compensation Law, § 18.—*Bloomfield v. November*, N. Y., 167 N. Y. S. 975.

71.—Proximate Cause.—That direct cause of injury to servant was animate, being bite of factory engineer's dog, kept on premises with employer's implied knowledge, does not alter result that injury was in course of employment.—*Barone v. Brambach Piano Co.*, N. Y., 167 N. Y. S. 933.

72.—Scope of Employment.—Employe who was run down by another train when he was trying to reach second train to remove therefrom tools used by him, held to be acting within the scope of his employment, so that compensation might be allowed under Workmen's Compensation Act.—*Alexander v. Industrial Board*, Ill., 117 N. E. 1040.

73.—Suitable Appliances.—Where stave company furnished carpenters repairing building suitable materials to construct scaffold, and one constructed scaffold so defective it fell and injured other, company was not liable for not furnishing reasonable appliances or safe place to work.—*Holland-Blow Stave Co. v. Spencer*, Ala., 77 So. 65.

74.—Workmen's Compensation.—Under Workmen's Compensation Act, § 1, par. 3, cl. (c), if an employe was discharged from work upon one building, and a few days later was rehired on another building, there was a new hiring, and the employer, having posted notice as to the new building, was liable only to pay workman's compensation, and not in damages.—*Curran v. Wells Bros. Co.*, Ill., 117 N. E. 984.

75. Mortgages—Future Advances.—Mortgage executed by lumber dealer to lumber company to secure future advances, covering only property incumbered by purchase money or other prior liens to amount of market value, held not

fraudulent as to mortgagor's judgment creditor within Code 1907, § 4293.—*Manchuria S. S. Co. v. Harry G. G. Donald & Co.*, Ala., 77 So 12.

76. Municipal Corporations—Negligence.—Fact that nothing was attached to cover of coalhole in sidewalk at time of plaintiff's injury by stepping into hole does not tend to show any negligence of defendant lessees and sublessees of premises.—*Gunning v. King*, Mass., 118 N. E. 233.

77.—Officer.—Where superintendent of municipal street car line in violation of ordinance paid money to city clerk, money held not received by virtue of his office or under color of his office, and his surety was not liable for defalcation.—*United States Fidelity & Guarantee Co. v. Yazoo City*, Miss., 77 So. 152.

78. Negligence—Duty of Master.—A railroad owes no duty to send an engine to remove shanty car in which a servant has been allowed to live and which is endangered by a rising flood.—*Matthews v. Carolina & N. W. Ry. Co.*, N. C., 94 S. E. 714.

79.—Invitee.—An expressman, who was to carry properties from defendant's theatre for use by theatrical company in which defendant was interested, held an "invitee" for whose benefit defendant was bound to exercise ordinary care.—*McCullen v. Fishell Bros. Amusement Co.*, Mo., 199 S. W. 439.

80.—Licensee.—Where plumbers in making repairs to defendant's toilet opened a trapdoor in the floor to turn off the water, and while working there the plaintiff, a bare licensee, for his own benefit entered and fell into opening though the room was lighted, defendant was not guilty of an "affirmative act" of negligence.—*Vaughan v. Transit Development Co.*, N. Y., 118 N. E. 219.

81.—Mitigating Damage.—Where statutes prescribing precautions to prevent collisions applies, negligence of person injured on railroad track can only be taken in mitigation of damages.—*Chattanooga Station Co. v. Harper*, Tenn., 199 S. W. 394.

82. Parent and Child—Custody of Estate.—Father has no right by reason of parental relation to custody of estate of his minor child, and so payment to father of judgment rendered in favor of infant does not satisfy judgment.—*Paskewie v. East St. L. & S. Ry. Co.*, Ill., 117 N. E. 1035.

83.—Irrevocable Contract.—A father cannot irrevocably contract away his right respecting the custody of a minor child.—*Marks v. Wooster*, Mo., 199 S. W. 446.

84. Principal and Agent—Notice to Agent.—The general rule is that the principal is bound by the knowledge of the agent; but where to disclose information would violate professional confidence, or be inimicable to the agent's interest, or where the circumstances are such that, in all reasonable probability, the principal was not informed, there is no such presumption.—*Watt v. German Sav. Bank*, Iowa, 165 N. W. 897.

85. Railroads—Crossing.—In action against railroad for death on crossing, instruction that deceased had equal right to travel with automobile on road at intersection with railroad as railroad had to run trains at point, was improper as confusing and misleading.—*Baker v. Collins*, Tex., 199 S. W. 619.

86.—Switching Operation.—Terminal railway company nightly moving sleeping car between two stations held engaged in "switching operation" while so doing, so that statutory precautions for prevention of railway accidents did not apply.—*Chattanooga Station Co. v. Harper*, Tenn., 199 S. W. 394.

87. Removal of Causes—Filing Petition for.—Under federal Judicial Code, § 29, defendant, who acquiesced in order extending time for filing of pleadings, loses his right to remove cause to federal court on ground of diversity of citizenship upon petition filed after expiration of time for filing answer fixed by law, though order was one usually made in such cases without request by parties.—*Dills v. Champion Fiber Co.*, N. C., 94 S. E. 694.

88. Sales—Breach of Warrant—Measure of damages for breach of implied warranty of machine sold was not necessarily amount buyer had paid, but was difference between value of machine had it been suitable and what it was actually worth.—*Holcomb & Holke Mfg. Co. v. Cataldo*, Mich., 165 N. W. 941.

89.—Instructions.—In action for fraud of seller in representing that engine of electric bus was new, admission of testimony that after sale it was discovered that numbers on engine had been chiseled off held error.—*Boyd v. Buick Automobile Co.*, Iowa, 165 N. W. 908.

90.—Stipulations—Taxing Costs.—Stipulation that advancement of money to pay stenographers and a referee should be taxed as costs becomes law of the case as between the signing parties.—*In re McManus' Estate*, Mo., 199 S. W. 422.

91. Street Railroads—Franchise Duty.—Where franchise provides only that street railway company shall keep street between its tracks in repair, no obligation rests on company to pave or otherwise improve street.—*State v. Vincennes Traction Co.*, Ind., 117 N. E. 961.

92. Sunday—Moving Picture Show.—The operation of a moving picture show on Sunday is not a work of "daily necessity," within the exception in *Kirby's Dig.*, § 2030, forbidding Sunday labor.—*Rosenbaum v. State*, Ark., 199 S. W. 388.

93. Telegraphs and Telephones—Contributory Negligence.—In action for personal injury to one hunting from telephone wire hanging across public highway, that plaintiff did not have a hunter's license in violation of the hunter's license law, did not contribute in any degree to his injury.—*Walmsley v. Rural Telephone Ass'n of Delphos*, Kan., 169 Pac. 197.

94.—Undisclosed principal.—An undisclosed principal cannot recover damages for negligent failure of telegraph company to promptly deliver a message to his agent.—*Western Union Telegraph Co. v. Lowden*, Miss., 77 So. 145.

95. Trust—Evidence.—To establish trust in money received by H. from K. as part of that stolen by K. from plaintiff, particular pieces of money need not be identified, but it is enough that, among those taken by K., there is enough of each kind to make up those received by H. from K.—*Schramm-Johnson Drugs v. Kleeb*, Utah, 169 Pac. 161.

96.—Resulting Trust.—Where third person takes title in his own name to land, although another pays consideration, and though a conveyance by one who took title to one paying consideration was void, nevertheless one paying consideration was owner of land by virtue of the resulting trust.—*Kepler v. Castle*, Ill., 117 N. E. 1029.

97. Will—Construction.—In will prohibiting division of property until youngest child reached 21, and that if any child died without issue, his share should be divided among other children "then living," quoted words refer to date of division, and estate vests when youngest child reaches 21.—*Whitfield v. Douglass*, N. C., 94 S. E. 667.

98.—Construction.—Where testator devised realty and personality to his two children, providing that, in event his son "shall die without issue living at the time of his death," his share should go to the other child, his language had a fixed legal meaning, and referred to the death of the son within the lifetime of the testator.—*Hall v. Bauchert*, Ind., 117 N. E. 972.

99.—Undue Influence.—Where will was asserted to be result of undue influence, evidence that, a few months after its execution, testatrix and proponent indulged in unnatural and illicit intercourse, is admissible to overcome presumption of validity of will arising from testatrix's failure to revoke or destroy it before her death.—*Beadle v. McCrabb*, Tex., 199 S. W. 355.

100.—Revocation.—Where a feme sole executed a will in 1869 and thereafter married, her marriage did not revoke the will; Laws 1866-67, c. 496, and subsequent legislation, having removed the disabilities of coverture.—*Lee v. Blewett*, Miss., 77 So. 147.

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INQUIRY INTO ALL THE FACTS OF AN ALLEGED CONTEMPT IN THE FACE OF THE COURT.

In *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724, 28 L. ed. 1117, Justice Miller, in a habeas corpus case, claiming release from imprisonment for contempt, said: "There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court. * * * This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." Then he states that when an attempt is made by a court to punish for contempt in refusing to obey an order the court is alleged to have no authority to make, a petition in habeas corpus may make "inquiry into the cause of the restraint of his liberty."

Judge Taft in *Ex parte Irvine*, 74 Fed. 954, applying this rule, held that, though there might be appeal by one from an order adjudging him guilty of contempt, yet when habeas corpus is resorted to, the authority of the court to impose the punishment could be inquired into in a collateral way.

A recent decision by Missouri Supreme Court, in *Ex parte Howell*, 200 S. W. 65, in speaking of the claim of absolute verity of a judgment in direct contempt, says:

"While the older authorities in other jurisdictions, from which the text writers deduce statements of principles, unqualifiedly apply the general rule of immunity from collateral attack to judgments of the character here in question, we hold otherwise. Here one convicted of direct attempt, in seeking relief through habeas

corpus, is not limited to an inquiry as to the convicting court's jurisdiction; but, if the truth of the findings upon which the judgment is based is denied in the petitioner's reply, inquiry may be made in regard thereto. To this extent we have, as has been done elsewhere, brushed aside the hard and fast rule which heretofore hedged about judgments for direct or criminal contempt, rendering them immune from attack, and have authorized an inquiry to test the truth of their findings."

This principle ought ever to have been deemed sound and in a general, broad way even the older cases in American law very possibly never departed therefrom. It hardly is conceivable, that at any time in our history it has been true that a court of general jurisdiction could upon some claim having no pretense to foundation in fact, fine or commit a citizen for contempt, and he have no right to inquire into the authority of the court's action. But we hardly believe it to be true, that such inquiry should go any further than to ascertain whether there was a bald assertion of authority that does not exist. If facts are in dispute, or there may be different inferences in regard to facts, there is no reason to fear any denial of the right to enforce contempt, by courts in the exercise of their powers.

Thus, while we approve of the finding in the *Howell* case, that no contempt was committed, yet this is so because nothing was shown in the order making recital of the facts that showed any justification for the order by the court. It shows that counsel made an application they had the undoubted right to make and claiming that under the statute the very making of this application ousted the court of jurisdiction to proceed in the cause before it, they declined to continue in the case or to make any motion for a continuance of the cause to a later day. Without finding that they acted contumeliously or in any way as wanting in deference, the court yet said they "by their words, acts and gestures, offer and commit willful contempt in the

immediate view, presence and hearing of the court."

Conceding that the making of the motion ousted the court of jurisdiction and counsel announcing that they had nothing further to say of itself amounted to no contempt whatever, could it not be shown that nevertheless the making of the motion and the announcement of counsel having nothing further to say when the motion had been denied, was in a contemptuous and insulting manner? And, if the court deemed the manner contemptuous and insulting, could its apprehension or view of the matter be overruled in habeas corpus?

The Supreme Court appears to think that the fact that the court received the motion, caused it to be filed and then denied it, shows it was not offered in a contemptuous way, or in a manner not deferential. But this does not follow. A court may entertain a legal motion and perhaps should, though it be offered in a disrespectful manner, and then punish for contemptuousness in the making. Nor does the fact that counsel stood mute, as the order said they did when called on to make further announcement, show that this standing mute was not disrespectful or lacking in deference.

It appears that one of the counsel said: "If it is necessary for somebody to go to jail in order that the State may get justice in this case, I am ready to go," but for this the court only cautioned him to "be careful or I will fine you again." It is easy to see that what counsel said might be thought to be a contemptuous remark. The Supreme Court, however, said that the court's remark "did not constitute an illuminating illustration of that cool judicial equipoise which should characterize the conduct of a judge assessing punishment against counsel for an infraction of the court's dignity." The Supreme Court possibly might have better inquired whether what counsel said showed contempt. It was said while the court was still considering the matter, and even, if the case had been over with, counsel, as a mere bystander, could have been

punished for interjecting such an observation.

As stated we agree with the court's declaration that in habeas corpus inquiry may be made into exercise of pretended authority to punish for contempt, yet there seems here suggestion that the Supreme Court of Missouri failed possibly to inquire whether the offended court really punished for making the motion for change of venue or for standing mute after this motion was denied, or whether the punishment was imposed for contemptuousness in the making of the motion or in the standing mute. It is possible to see that these things, according to the manner of their being done or performed, easily could amount to contempt, and the right to administer a quick punishment as to acts *in facie curiae*, carries some presumption in favor of the eyes and ears of the punishing court seeing or hearing what was done. Indeed, contempt may consist of outbursts of temper or of veiled sarcasm or of gesture or attitude, or of sitting down when one should be standing up. Deference or lack of deference may be shown in a variety of ways, and to the court administering justice in a summary way much latitude in discretion should be allowed.

NOTES OF IMPORTANT DECISIONS.

PUBLIC POLICY—AGREEMENT NOT TO MARRY DURING LIFE OF DONOR INCIDENTAL.—In *Fletcher v. Osborn*, 118 N. E. 446, decided by Supreme Court of Illinois, where a contract by one to give land to another in consideration of service to be rendered during the lifetime of the former has been fully executed, a clause providing that the latter shall remain single during the period of service is to be deemed as merely an incident to the main object, the employe actually remaining single.

The Court said: "Appellant and deceased did not contract expressly for a restraint upon the marriage of appellant, but they were contracting for the services of appellant in caring for deceased and in supervising the management of his property. The provision that appellant

should remain unmarried during this period of service was merely an incident to the main object and purpose of the contract." In support of this holding there is cited *King v. King*, 63 Ohio St. 363, 59 N. E. 111, 52, L. R. A. 157, 81 Am. St. Rep. 635. Authorities also were cited of latitude allowed testators where perpetual celibacy is not imposed, as for say, until beneficiary shall reach his or her majority, and it has been ruled that where services have been accepted and more mischief would result from denying than permitting recovery, the void provision will not be regarded.

It seems to us that there ought to be some accommodation, in an equitable way, at least, in such a contract. Contractual provisions of this kind in the securing of services ought not to have the same rigidity of application to them as in wills. There is no presumption that the parties intend to obtain what is of value and be obligated in no way to account therefor upon some principle of forfeiture, unless the contract is clear to that effect.

NEGLIGENCE—ACTS IN EMERGENCY SUBSTITUTE FOR EFFICIENT COURSE.—In *Kelch v. National Contract Co.*, 199 S. W. 796, decided by Kentucky Court of Appeals, there was a claim for alleged negligence in not immediately stopping machinery so that the life of an employe, who had fallen into a chute and was thereby carried into a river could have been saved.

The evidence shows that defendant was engaged in building a dam in the Ohio river and in connection therewith a coffer dam, and connecting the two was a sluiceway or chute, into which pumps emptied water. This water ran out in a swift current into which decedent fell and was carried out in the chute to the river some twenty feet below where he was drowned. Immediately one of the employes hollered to the engineer working the pumps supplying the chute to shut off the machinery, but the running water and the operation of the machinery prevented his being heard. As soon as the engineer could be made to hear he stopped the pumps, but he was not efficiently notified until after the foreman ordering the machinery stopped, took time to pick up a spike pole near the machinery to extend same to decedent struggling in the river. Decedent sank for the last time within two minutes from the time he fell into the chute.

Whether, if the foreman had given immediate notice, so as to stop the machinery, decedent might have been rescued does not very clearly appear. He was being borne down by water

in the chute and this would have occurred though the water had been cut off immediately, and his being in the river the cessation of the current through the chute hardly could have made any difference. At all events, however, the court speaks of the stop to pick up the spike pole as an act in an emergency, and as not proving the best way to effect a rescue. The court said: "They (the servants) believed that they had been heard when they hollered for the pump to be stopped. There was no time to be lost in waiting to see; what deceased most immediately needed was something upon which he could rely to prevent his sinking and to assist him in getting to a place of safety. The only available thing was procured and every effort made to accomplish with it the purpose intended. When it was found that such efforts were fruitless, with all reasonable dispatch the pumps were ordered to be stopped. Can it be said, under the facts of this case, that the agents or servants of defendants were guilty of negligence because forsooth they did not first see and procure the stopping of the pumps? We think not. To have thus consumed the time required may have been to no purpose after all and also may have been at the expense of a possible chance to save the life of the deceased, and the law does not demand in such emergencies, mathematical accuracy or conduct of exact calculation so as to fasten liability on the actor should he miscalculate as to the proper things to do and the order in which they should be done."

The general rule, stated in 23 Cyc. 434, is that: "If an act has to be performed in a brief period with no time in which to determine the best course, negligence cannot be predicated of it." If this were not so the rule more strongly would require plaintiff to show that stopping of the pumps would have been a probably more efficient method to pursue than to seek what was sought. At all events, there was a case where reasonable judgment was to be relied on, had there been no necessity to come to an immediate conclusion.

APPEAL AND ERROR—REVERSAL AS TO ONE OF TWO CONSPIRATORS AND AFFIRMANCE AS TO OTHER.—In *People v. La Bow*, 118 N. E. 395, decided by Illinois Supreme Court, it was held in a conspiracy case against two defendants tried jointly, that reversal and remand by Illinois Appellate Court as to one, as to whom error was committed in ruling on evidence, necessitated reversal as to the other, dissent by the chief justice being announced.

There were questions considered as to co-defendant Shapiro, who was attempting to show he had no connection with any conspiracy to obtain money fraudulently. The connection claimed depended for its proof upon an alleged conversation between the two defendants and the obtaining of the money afterwards. No overt act by the co-defendant was shown. The Court of Appeals held there was error in excluding testimony by him as to contradictory statements by the witness regarding the actual conversation and its purport.

The reversal by the Court of Appeals being held to be final, it was said by Supreme Court: "From the evidence in this record it is apparent that the plaintiff in error was guilty of obtaining money unlawfully from these women. He was not charged in the indictment with that crime. He was charged with and convicted of the crime of conspiring with Shapiro to thus obtain money, and the transactions proven in which it was shown the money was obtained were admissible only as tending to prove the conspiracy and to characterize the crime with which defendants were charged. If Shapiro was not guilty of conspiracy or if there was a doubt as to his participation in a conspiracy with plaintiff in error, it must follow that plaintiff in error was not guilty, as that same error must be resolved in his favor. There is no evidence in the record of a conspiracy on the part of plaintiff in error with any one except Shapiro. In order to sustain a conviction for a conspiracy there must be more than one person shown to be guilty."

It is the law that conspiracy to commit a crime is different from the consummated crime which is its object. U. S. v. Robinovitch, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed., 1211; Com. v. Ward, 92 Ky., 158, 17 S. W. 283. And where, as for example, husband and wife cannot be convicted of conspiring to commit an offense, each may be tried for committing a consummated offense. State v. Mann, 39 Wash. 144, 81 Pac. 561. It seems, therefore, to have been altogether unnecessary for these two defendants to have been jointly indicted, and had they been there would have been full notice with opportunity for defense. Where the essence of the offense is in the conspiracy this would be different. In case the essence is in the consummated crime, evidence of conspiracy to commit would be perfectly competent, or to show identity of an accused or the intent with which it was committed. In such a case there is such a relation between conspiracy and consummation as ought to allow the two things to be charged in one indictment with different counts. It would not

be a too liberal practice to allow a court to amend an indictment by adding a count for commission, where conspiracy is not the gist of the matter.

PRIVATE CONTRACTS AND STATE REQUISITIONS.

The recent judgment of the House of Lords in the case of Dick Kerr & Co., v. Metropolitan Water Board,¹ is a landmark in the development of the law as to when performance of a contract may be excused on the ground of impossibility of performance. The old rule of the common law that where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, even though performance has become unexpectedly burdensome or even impossible held sway in our courts until Lord Blackburn's judgment in the case of Taylor v. Caldwell, 1863,² in which that eminent authority mitigated the rigor of the old rule by the following pronouncement regarding it: "This rule is only applicable when the contract is positive and absolute, and not subject to any condition, either expressed or implied, and there are authorities which establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, then, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the

(1) 114 L. T. J. 75.

(2) 3 B. & S. 826.

perishing of the thing without default of the contractor."

That principle has been gradually extended and particularly during the war, its latest application being in the case of *Dick Kerr & Co.*, already referred to. The facts of that case were briefly as follows: Just before the war began the defendants contracted to make a reservoir which was to be completed within six years. The contract contained a stipulation that, if by reason of any impediment the defendants were delayed in the completion, the time might be extended by the plaintiff's engineer. The carrying on of the work was prevented by the Minister of Munitions, who, under his powers, caused the plant on the works to be removed. The Court of Appeal held that the interruption of the work thus caused was not such a temporary interruption as could be regarded as falling within the suspensory clause of the contract. The House of Lords has now upheld the Court of Appeal. Wherefore it would seem that these suspensory clauses in contracts entered into before the war, and no doubt in many contracts entered into since the war, have not the effect of keeping contracts on foot where the object of the contract is in substance frustrated by unforeseen circumstances making performance as contemplated by the parties impossible. "It is obvious," remarks one legal contemporary, "that cases of this kind all go to discredit the old dogmatic rule that an absolute contract must be performed, or damages paid for non-performance."

Notwithstanding this considerable modification of the common law the legislature recognized that in case of direct interference by the state with private contracts under the necessity of war requirements, the situation was not sufficiently met by the common law, and consequently there was enacted Section 1 (2) of the Defence of the Realm (No. 2) Act of 1915, which provides:

"Where the fulfillment by any person of any contract is interfered with by the

necessity on the part of himself or any other person of complying with any requirement * * * of the Admiralty or the Army Council under the Defence of the Realm Consolidation Act, 1914, or this Act, or any regulations made thereunder, that necessity is a good defence to any action or proceedings taken against that person in respect of the non-fulfillment of the contract so far as it is due to that interference."

That proviso has since been extended to requirements of any government department, or of a competent naval or military authority.³

Two decisions on these statutory enactments illustrate when they may be justifiably used and when not. The first we propose to refer to, *Manuel Mas v. Brookless Bros.*,⁴ was an action of damages for breach of contract by a Madrid merchant against a firm of exporters in Aberdeen. In consequence of the war the export of goods from the United Kingdom to foreign countries was subject to very strict supervision by the British Government, and exporters were advised before doing business with European firms to refer to the Chairman of the War Trade Intelligence Department. The defendants did refer to the department for guidance, and its chairman wrote them in reply: "According to my information the firms of Manuel Mas, Madrid (and others named) are forwarding agents and it would not appear desirable to undertake to export to these firms unless you are informed of the actual buyers of the goods to be exported and their names appear on the documents." On receipt of this letter the defendants wrote to the plaintiff requesting him to give the names of his buyers; but this, the plaintiff explained, it was not possible for him to do. After some further correspondence the exporters cancelled the contract, and the court held that by virtue of the statu-

(3) *The Courts Emergency Powers, Act of 1917.*

(4) 1917, 2 B. L. T. 189.

tory provisions above mentioned the defendants were not liable in damages and dismissed the action against them.

The effect of the decision in the other case which we propose to comment on,⁵ will be to check any tendency on the part of manufacturers to rely too readily on the statutory protection or even to attempt to utilize it for their own private benefit. The defendants had entered into a contract to supply a large quantity of boots to the plaintiffs which were intended for use in the Army, and for the purposes of carrying out their contract they had entered into a subcontract with a firm of boot manufacturers named Mumfords, whose factory was afterwards requisitioned by the War Office while the order was in process of execution. Instead of attempting to get the order carried out by some other manufacturer or applying the goods already manufactured (which were in fact released by the representative of the War Office as soon as he became aware of the circumstances) to the part fulfillment of the contract, the defendants contented themselves with a repudiation of the whole contract, relying on the protection of the enactment referred to. The statutory exemptions, however, are limited in each case to contracts the fulfilment of which is prevented by the "necessity" of complying with some Government requisition, and the burden is cast on the defaulting contractor to prove that such a necessity was the real cause of non-fulfilment. In result the defendants failed to satisfy the court that the requisition of their sub-contractor's works was the real cause of the failure to supply the goods.

In the course of argument in the case it was contended that the judgment of the House of Lords in the case of Dick Kerr & Co., was applicable to the effect that as soon as the Government requisition was made on Mumfords, the whole contract was at an end. But, however, that might be as to

(5) Lothburg Supply Association v. Flatau & Co., Law Journal, 1917, p. 436.

the sub-contract, it did not apply to the main contract between the parties in this action, which still remained capable of performance.

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LIMITATIONS OF THE TREATY-MAKING POWERS OF THE PRESIDENT OF THE UNITED STATES WITH THE CONCURRENCE POWER OF THE SENATE—PART I — NATURE AND EXTENT OF SUCH POWER.*

The purpose of this paper is to show: That the Constitution of the United States does not vest any authority in the President with the advice and consent of the Senate to enact a treaty between the United States government and any foreign country, which in any way, remotely or otherwise, restricts the sole and absolute right of the states of the United States to regulate and control the vesting of the title and leases of the uses of real estate situated within their boundaries, the title of which is owned by citizens thereof or by the states.

Nature and Extent of the Treaty-making Power of the Government of the United States.—The Constitution says that the President "shall have power by and with the advice of the Senate to make treaties, provided two-thirds of the senators present concur."¹

The President may, before negotiating a treaty, ask the Senate for advice, and his right to do so has never been disputed.²

*Part II of this article will appear in next week's issue and will discuss the application of these principles to the controversy with Japan and the California land laws.

(1) Art. II, Sec. 2, 2.

(2) Washington did so repeatedly, and Polk did it in 1846 in case of the treaty with England relative to Oregon. Von Holst's Constitutional Law of U. S. (1887), p. 201.

(3) See Gadsden Treaty of December 30, 1853. Von Holst's Constitutional History, Vol. V, pp. 6-9.

The Senate may amend a treaty laid before it without rendering it unconstitutional.³ But the President would not be bound to obey the request. The expression of such a wish is without doubt also within the power of the House of Representatives.⁴

"The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society, while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seems to comprise all the functions of the executive magistrate. The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the execution of new ones; and still less to an exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law, but derive it from the obligations of good faith. The power in question seems, therefore, to form a distinct department, and to belong, properly, neither to the legislative nor to the executive."⁵

Hence the sole authority of the government of the United States to enter into the contractual relation (to enact a treaty) with a foreign country is vested by the Constitution in the President. The President may be defeated in consummating such a contract if two-thirds of the senators present disapprove the treaty, but the said two-thirds of the senators cannot consummate a valid treaty without the President's signature to the same.

It is trite to say that the Constitution consists solely of enumerated powers. But the subject-matter of any treaty entered into by the President on behalf of the United States with foreign nations, must come within the enumerated powers vested in the President and Congress as expressed by the Constitution. Hence, any treaty stipulation which is inconsistent with the provisions of the Constitution is inadmissible

and, according to constitutional law, *ipso facto*, null and void.

"Simple and self-evident as this principle is in theory, yet it may be very difficult under certain circumstances to decide whether or not it has been transgressed in fact. Indeed, the chief difficulty arises from the question of the relation the treaty-making power of the President with the concurrence power of the Senate bears to the legislative power of Congress. This question is answered by saying that these powers must be co-ordinate, for treaties, like laws, are 'sovereign acts,' which differ from laws only in form and in the organs by which the sovereign will expresses itself."⁶

It follows from this principle that a law can be repealed by a treaty,⁷ as well as a treaty by a law.⁸ If a law and a treaty are in conflict, their respective dates must decide whether the one or the other is to be held as repealed.⁹

"The courts of the United States cannot hold a law unconstitutional upon the ground that it violates treaty obligations. Such a question is an international one, to be settled by the foreign nations interested therein and the political department of the government."¹⁰

The rule for determining the extent of the treaty-making power of the United States is therefore proven to be this:

That the treaty-making power of the President of the United States with the concurrence power of the Senate and the legislative power of Congress are co-ordinate powers, both being "sovereign acts"—and differ from laws only in form and in the organs by which the sovereign will expresses itself.

The rule laid down in the case of *Foster v. Neilson* has been constantly affirmed in

(6) Von Holst's Const. Law of U. S., p. 202; Callaghan & Co., 1887.

(7) *Foster v. Neilson*, Peters II, 253 (U. S. 27). Jan. Term, 1829.

(8) *The Cherokee Tobacco*, Wallace XI, 616 (U. S. 78), 1871.

(9) *Foster v. Neilson*, Peters II, 253, 314 (U. S. 57); *Doe, et al. v. Braden Howard XVI*, 635, December Term, 1853.

(10) *Gray v. Clinton Bridge*, 7 American Law Register (N. S.) 151; *Hammond I*, 22 Sec. 54.

(4) Von Holst's Const. Law of U. S. (1187). pp. 201-202.

(5) Hamilton in The Federalist, No. LXXV.

a long line of cases;¹¹ also the rule established in the Cherokee Tobacco cases, just stated, has been approved by an unbroken chain of decisions.¹²

Cases Which Illustrate the Limitation of the Extent of the Treaty-making Power and the Principles Underlying the Same.—A treaty is primarily in its nature a contract between nations, and not a legislative act. A treaty with the United States is, however, more than a contract between nations,¹³ being, as declared by the Constitution of the United States (Art. 6), the supreme law of the land and binding upon all courts, both state and federal.

The treaty-making power of the United States is as expressed in the Constitution, unlimited,¹⁴ and subject only to those restraints which are found in that instrument against the action of the government or its departments and those arising from the nature of the government itself and of that of the states.¹⁵ To what extent it is thus limited has been considerably discussed without being definitely defined,¹⁶ no treaty having ever been declared by the courts to be void.¹⁷ It would seem clear, however, that the treaty-making power does not extend so far as to authorize what the Constitution forbids,¹⁸ or a change in the character of the government, or in that of the states,¹⁹ and it has also been stated that it would not authorize a cession of any portion of the territory of a state without the consent of that state.²⁰

An Act of Congress cannot be declared unconstitutional or void because it is in conflict with the provisions of a prior treaty. A statute is a law equal with a treaty and, if subsequent and conflicting

(11) *Supra*; *Edye v. Robertson*, 112 U. S. 580.

(12) *2 Peters (U. S.)* 253.

(13) *U. S. v. Rauscher*, 119 U. S. 407 (1886); *2 Peters U. S.* 253; *Minnesota Canal, etc., Co. v. Pratt*, 101 Minn. 197.

(14) *DeGeoffroy v. Riggs*, 133 U. S. 258 (1889).

(15) 133 U. S. 258 (1889).

(16) *Ware v. Hylton*, 3 Doll. (U. S.) 199 (1796).

(17) 133 U. S. 258.

(18) 133 U. S. 258.

(19) 133 U. S. 258.

with the treaty, supersedes the latter.²¹ This is the holding of the court in *Horner v. U. S.*, where it was contended that 3894 U. S. R. Statute was unconstitutional and void because it was a violation of a treaty between the United States and Austria.

"So far as a treaty, made by the United States with any foreign nation, can be made the subject of judicial cognizance, in the courts of the country, it is subject to such acts as Congress may pass for its enforcement, modification or repeal."²²

There is no Federal Probate Law.—The Supreme Court of the United States, in construing the provisions of the Italian treaty of May 8, 1878, and the Argentine treaty of July 27, 1853, respecting the appointment of administrators of estates of deceased aliens, says:

"The most-favored-nation clause in the Italian treaty of May 8, 1878 (20 Stat. at L. 732), does not give an Italian Consul General the right to administer the estate of an Italian citizen dying intestate in one of the States of the United States, to the exclusion of the one authorized by the local law to administer the estate, because of the privileges conferred by the Argentine treaty of July 27, 1853 (10 Stat. at L. 1009), art. 9, upon the consular officers of the respective countries as to citizens dying intestate, 'to intervene in the possession, administration and judicial liquidation of the estate of the deceased, conformably with the laws of the country, for the benefit of the creditors and legal heirs,' since this provision, if applicable, cannot be construed as intended to supersede the local law as to the administration of such estates."²³

In the second paragraph of the syllabus of the *Rocca* case just cited, the court says: "There is no federal probate law, but the right to administer the property left by a foreigner within the jurisdiction of a state is primarily committed to state law."

(20) *Horner v. U. S.*, 143 U. S. 570 (Feb. 29, 1892).

(21) 31:386, *Whitney v. Robertson*, 124 U. S. 190 (Jan. 29, 1888); 28:798, *Head Money Cases*, 112 U. S. 580 (1884); 32:1088, *Chinese Exclusion Case, Ping v. U. S.*, 180 U. S. 581 (May 19, 1889).

(22) *Rocca v. Thompson*, 223 U. S. Ct. Rep. (Feb. 19, 1912).

This is the law in the United States, from which there is no appeal. There is nowhere in the Constitution or its amendments any authority vested in Congress to enact a law assuming charge of the administration of estates under the jurisdiction of the states, nor authorizing the President to make a treaty containing provisions vesting anyone with authority to administer estates of deceased aliens to the exclusion of those specified by the state law, notwithstanding the "Quaere" raised by the court in the Rocca case, *viz.*, "Whether it is within the treaty-making power of the national government to provide by treaty with foreign nations for administration of property of foreigners dying within a state and to commit such administration to consuls of the nation to which deceased owed allegiance."

Thus we have established a second proposition:

That neither the treaty-making power nor the Congress of the United States have assumed (nor attempted to assume) jurisdiction over those property rights which are incident to the administration of estates of deceased aliens, by vesting foreign consuls with rights prior to and exclusive of the rights of those persons named in the state statutes, and over which the state legislatures have always exercised jurisdiction through the administration of their laws of probate—a sovereign right of the states, and relate solely to matters of local interest.

The Act of Congress of October 1, 1888, prohibiting Chinese laborers from entering the United States who had departed before its passage, having a certificate issued under the Act of 1882 as amended by the Act of 1884, granting them permission to return, is valid.²⁸

Although the Act of 1888 is in contravention of express stipulations of the Treaty of 1868 and of the Supplemental Treaty of 1880, it is not on that account invalid or to be restricted in its enforcement.

(28) *Ping v. U. S.*, 130 U. S. Ct. Rep. 581 (May 13, 1889).

Treaties are of no greater legal obligation than an Act of Congress, and are subject to such acts as Congress may pass for their enforcement or repeal.

The government of the United States, through the action of the legislative department, can exclude aliens from its territory, although no actual hostilities exist with the nation of which the aliens are subjects.

The power of exclusion of foreigners is an incident of sovereignty and the right of its exercise cannot be granted away or restrained on behalf of anyone.

In the case of *Ping v. United States*, the court lays down the rule, in its own language, which determines the extent of the treaty-making power of the President with the concurrence power of the Senate and the co-ordinate power of Congress in its relation thereto, in the following language:

Rule I.—"The treaties were of no greater legal obligation than the Act of Congress. By the Constitution, laws made in pursuance thereof, and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed, in that particular only, the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control."

In the same case the court defines the distinction between the governmental control of local matters, which are left to local authorities, and of national matters which are entrusted to the national government, as follows:

Rule II.—"The control of local matters being left to local authorities, and national matters being entrusted to the government of the Union, the problem of free institution existing over a widely extended country, having different climates and varied in-

terests, has been happily solved. For local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."

JAMES HARRINGTON BOYD.
Toledo, O.

SALES—RESCISSON.

KENNEDY v. HASSELSTROM.

Supreme Court of South Dakota. Feb. 5, 1918.

166 N. W. 231.

Where the purchaser of goods offered to rescind, but the seller refused to accept a return of the property, there was no accomplished rescission of the purchase.

WHITING, P. J. By plaintiff's original complaint, she sought to recover the price she had paid for certain personal property purchased of defendant, basing such claimed right of recovery on an alleged rescission of the purchase. Her amended complaint, while containing an allegation of an offer to rescind and a refusal of defendant to accept a return of the property purchased, contained all the essential allegations of an action for damages caused by fraud and deceit. Such alleged fraud and deceit consisted in false representations that defendant was the owner of the property. The trial court found all of the allegations of the amended complaint to be true; and also that:

"Since the commencement of this action the defendant having refused to agree to a rescission of the said sale and having declined to return to the plaintiff the said \$440 or any part thereof, and the said personal property being then in substantially the same condition and of the same value as at the time of the pretended sale thereof by the defendant to plaintiff in February, 1914, plaintiff abandoned and surrendered the possession thereof, and has at no time since then asserted any possession or control of the same."

The trial court concluded that plaintiff was entitled to recover the full purchase money, "for and as money procured by fraud and false and fraudulent pretenses"; and rendered judgment therefore, which judgment recited that such money "was procured by the defendant from the plaintiff by fraud and by means of

false and fraudulent pretenses." From such judgment and an order denying a new trial this appeal was taken.

It is clear that, when this action was brought there had been no accomplished rescission of the purchase. The judgment herein cannot therefore be sustained upon the ground that, having rescinded, plaintiff was entitled to recover the purchase money. Neither can the judgment be sustained as a judgment based upon the implied warranty of title because plaintiff had never been deprived of the possession of the property. Section 2304, C. C. But plaintiff was entitled to recover damages for the false representations as to title, and his right of recovery was in no respect dependent upon any recovery of possession from her by the true owner. Hull v. Caldwell, 3 S. D. 451, 54 N. W. 100. It follows, therefore, that the findings support the judgment.

We find no reversible error in the rulings upon the admission of evidence, nor any questions raised upon such rulings as meriting discussion.

The only further question for consideration arises upon the assignment that the evidence does not support the finding that defendant was not the owner of any of the property. It is clear that plaintiff's recovery for damages caused by the false representations as to title must be limited by the amount of property to which defendant did not have title—plaintiff cannot recover the value of any property the title to which did pass to her from defendant when there had been no rescission. Of course, if there had been a rescission prior to suit brought, the situation would be different. In that case the consideration being, as in this case, indivisible, there could have been a complete rescission and then a recovery of the whole purchase price. The same would have been true if rescission had been asked for and decreed; with such decree there could have been joined a judgment for recovery of purchase price. But where the only recovery is one for damages based on false representations as to title of property purchased, and the representations were true as to some property, then there having been no rescission or there being no rescission prayed for or granted, there must be credited against the total purchase price the value of that property title to which did pass to the purchaser. Among the property included in the transaction between these parties was certain wire fencing, a part of which was on government land that had been rented by defendant. Title and possession of

such wire passed to plaintiff. The above-quoted finding is not supported by the evidence, there being no evidence that, even after suit brought, defendant ever surrendered possession of this wire. The value thereof should have been found by the trial court and deducted from the amount of the judgment rendered. There is no evidence from which we can determine the value of this wire, thus permitting a modification of the judgment by this court.

The judgment and order are reversed without costs to either party; and the cause is remanded to the trial court for further proceedings in harmony with this opinion.

SMITH, J. (dissenting). I cannot concur in the view of my Associates in this case. The complaint contains every allegation essential to a recovery of the purchase price of property in assumpsit, upon a rescission of a contract for fraud, and the trial court found every fact which in law is essential to such a recovery. The majority opinion holds, in effect, that where the plaintiff has offered to return everything received under a fraudulent contract—in short, to do every act necessary to complete a rescission—there has been "no accomplished rescission of the purchase." If this means anything it means that the refusal of a dishonest defendant to accept a return of the property "defeats the accomplishment of a rescission." A conclusion founded upon such a misconception of the law cannot be correct. The majority opinion, however, reaches the right result, because of the fact shown by the record, that plaintiff, after offering to return it, continued to use the property and to exercise acts of ownership over it, which acts constituted a waiver of the rescission. *Mizell v. Watson*, 57 Fla. 111, 49 South, 149.

My majority Associates I think are wrong in assuming, in the face of the pleadings and findings of the trial court, that the action was, or could be transformed into, an action for damages for deceit, and then holding the evidence insufficient to sustain a recovery. The complaint alleges the making of the contract; that plaintiff was induced to enter into it by false representations stated, and "that promptly upon the discovery of the falsity of such representations, this plaintiff offered to rescind the said purchase and tender back to the defendant all of the said personal property, and demanded of him that he should repay to this plaintiff the said sum of four hundred forty (440) dollars, but the defendant wrongfully, wilfully, and fraudulently refused, and still refuses, to receive back the said personal property, or to repay the said

money to this plaintiff," and alleges as her damages the amount paid as the purchase price of the property.

The answer denies the fraud and the offer to rescind. The trial court found that the representations alleged were falsely and fraudulently made by defendant, and that plaintiff was induced thereby to enter into the contract, and "that promptly upon the discovery of the falsity of such representations with reference to the said personal property and the fertile agricultural lands above mentioned plaintiff offered to rescind the said purchase, and tendered back to the defendant all of the said personal property, and demanded of him that he should repay to the plaintiff the said sum of \$440, but the defendant wrongfully, fraudulently, and unlawfully refused, and still refuses, to receive back the said personal property, or to repay the said money to the plaintiff," and that plaintiff was entitled to recover \$440, the purchase price, with interest at 7 per cent. from the date it was paid to defendant. If this is not an action, as in assumpsit founded upon a rescission of a fraudulent contract, for recovery of the purchase price, as disclosed both by the pleadings and the findings of the trial court, I must confess dense ignorance as to what such an action is. Nor do I see any necessity whatever for deciding a case upon, and adopting in this court, a theory which plainly was not in the pleadings of the parties, nor in the mind of the trial court.

Note.—Use of Property After Tender as Waiver of Rescission.—We think it cannot be rightly held, as the majority opinion says, that tender of property and refusal to accept prevents, in a case where there is right to rescind, a rescission from becoming an accomplished fact. The comment of the dissenting judge in this case seems entirely proper, but as he also says use of the property afterwards may have constituted waiver. The facts in each case determine the result.

In *Noble v. Olympia Brewing Co.*, 64 Wash., 461, 117 Pac. 241, 36 L. R. A. (N. S.) 467, there was a majority opinion of four to three in which it was held that where a purchaser after notifying seller of refusal to accept goods which were discovered to be inferior in quality, used them in his business, he waives right of rescission, but not claim of right of recoupment. What the purchaser was really contending for in this case was a discount in the selling price and without obtaining seller's consent therefor, he continued to use the goods.

Where goods are sold with privilege of test, it is said that no waiver results from testing what is only necessary to determine quality. If more is used, this constitutes waiver. *Fox v. Williamson*, 133 Wis. 337, 113 N. W. 669, 14 L. R. A. (N. S.) 1107; or if use is made after expiration of testing period, *Springfield Engine*

Stop Co. v. Sharp, 184 Mass., 266, 68 N. E. 224; Dawes v. Peebles' Sons, 6 Fed. 856. Any use after discovery of defect constitutes waiver. Comer v. Franklin, 169 Ala. 573, 53 So. 797; Sturgis v. Whisler, 145 Mo. App. 148, 130 S. W. 111; Van Dohren v. John Deere Plow Co., 71 Neb. 276, 98 N. W. 830; Cookingham v. Dusa, 41 Kan. 229, 21 Pac. 95; Brown v. Foster, 108 N. Y. 387, 15 N. E. 608.

But the nature of the use and its time are features to be taken into consideration. Thus a temporary use neither affecting the value of or injuring an article is not as matter of law a waiver of the right to rescind, Schwartz v. Church of the Holy Cross, 60 Minn. 183, 62 N. W. 266. Nor use continued at request of seller. Crabtree v. Potts, 108 Ill. App. 627. Nor, to make a thoroughly conclusive test, McCormick Harv. & M. Co. v. Dodkins, 24 Ky. L. Rep. 2306, 73 S. W. 1129. Repeated use for testing may cover a considerable period of time, where at request of seller. Sandwich May Co. v. Kelly, 26 Ill App. 394. But test being finished, insistence on rescission must be promptly urged. Cookingham v. Dusa, *supra*.

Presumption of waiver of right of rescission may be rebutted by buyer showing that the property has been held subject to order of seller. Comer v. Franklin, *supra*; Inman Mfg. Co. v. Am. Cereal Co. 124 Iowa, 737, 100 N. W. 860. The property, however, must be kept as a whole and not some of it sold to others. J. L. Owens Co. v. Doughty, 16 N. D. 110, 110 N. W. 78. Nor can a part be used on the theory of lessening the damages, where use is for buyer's benefit. Sturgis v. Whisler, *supra*.

However all questions of reasonableness are for the jury, generally speaking. Mizell v. Watson, 57 Fla. 111, 49 So. 149. If the facts are few and the evidence undisputed, this may be a question for the court. Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479; Libby v. Haley, 91 Me. 331, 39 Atl. 1004.

Notice to rescind is not the equivalent of rescission unless there is tender of the property. It may be only an expression of willingness to return the property. Thus where buyer wrote saying where the property could be gotten, buyer being unwilling to take it at any price, this is not an accomplished rescission. Skillings v. Collins, 224 Mass. 276, 112 N. E. 938.

If goods are shipped subject to inspection, they must be seasonably inspected, and if rejected, there must be return or offer thereto in a reasonable time. Allaire Woodward & Co. v. Cole, Mo. App. 187 S. W. 816. This does not, however, preclude buyer from showing that goods are wholly worthless, *ibid*.

As to what should be done in case of rejection of an article by the buyer, that is to say whether seller should regain possession or the buyer offer to put him in possession, this depends upon the circumstances of the sale. If an article of a wholly different kind is sent, the buyer is not required to return it. Gibson v. Vail, 53 Vt. 476; Unadilla Silo Co. v. M. A. Hull & Son, Vt. 96 Atl. 535; Spaulding v. Housecom, 67 N. H. 401, 32 Atl. 154; Rheinstrom v. Steiner, 69 Ohio St. 452, 69 N. E. 749, 100 Am. St. Rep. 699.

Generally then it may be said, that it is rather a question of mixed law and fact when a right

of rescission is lawfully preserved and when it is waived, as also what duty devolves on the seller and what on the buyer as to retaking possession or of tender of property by the buyer.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 145.

Public Prosecutor; Relation to Court; Relation to other attorneys—Permitting venireman to be selected as a trial-juror, when prosecutor is informed that former has expressed opinion that defendant should be convicted. Withholding such information from Court and adverse counsel; Disapproved.—Our statute provides that upon entering upon the trial of a cause in the Circuit Court, each party is furnished with a written list of the venire from which the trial-jury is to be selected. The parties alternately strike venire-men from the list until but twelve men are left, and they compose the trial-jury. In a criminal case, the prosecuting attorney has been informed that a certain individual on the venire has announced that in his opinion the defendant should be convicted. Is it proper for the prosecuting attorney to refrain from striking that individual from the list, and to refrain from informing defendant's attorney or the Court that said individual has expressed an opinion adverse to defendant?

ANSWER No. 145.

In the opinion of the Committee, the defendant is entitled to a trial by an unbiased jury. Good faith and fair dealing on the part of the prosecuting attorney require either that he should seasonably inform the judge presiding and the attorney for the defendant of the alleged expression of opinion by the venire-man, or should of his own accord strike the venire-man from the list. (See Canon 5, American Bar Association.)

QUESTION No. 146.

Relation to Court; Relation to Client—Lawyer who becomes convinced by the direct testimony of an adverse expert witness, not cross-examined, that client's cause is unfounded,

causes a judgment to be entered dismissing his client's action; Disapproved.—A woman brings an action against a decedent's estate on an alleged contract between her father and decedent for her adoption, whereunder she was to receive one-third of decedent's estate. The vice-president of the bank, of which decedent was president, testified that in his opinion the contract was actually signed by decedent. After the trial had lasted several days, a handwriting expert of repute testified for the defense. The next morning, plaintiff's counsel, without cross-examining the defendant's expert, said to the court in substance that up to the time of said expert's testimony he had been convinced of the justice of the cause, but thereafter felt serious doubt as to the genuineness of the contract, and said, "I felt then that possibly an imposition had been practiced upon me. I don't propose to practice an imposition upon this court or upon any other person. I therefore ask at this time for a dismissal of the case, or for a judgment that will end the case." Judgment was entered accordingly. Subsequently the plaintiff was tried and acquitted under an indictment for forgery of said contract, but the court on the civil side refused to reopen the case.

Even if the plaintiff's counsel was convinced in his own mind that there was forgery, was not his duty limited to a withdrawal from the case? Was it not his duty in any event to cross-examine the expert before asking a judgment against his client?

ANSWER No. 146.

A lawyer should not seek to secure for his client relief predicated upon testimony known to him to be false. The question, however, does not suggest such *knowledge*, but merely the attorney's individual conclusion. While the question implies that this conclusion was reached upon insufficient investigation, and that he acted imprudently, nevertheless if he reached the conscientious conclusion that further prosecution of the action would be an imposition upon the Court, the impropriety of his continuance in the cause is apparent. In the opinion of the Committee, unless the client consented to the retirement of the attorney, or to the dismissal or discontinuance of the cause, he should privately have stated to the Court his application for leave to withdraw, and the reasons therefore, and should have asked that the cause be continued to enable the client to procure other counsel.

In the opinion of the Committee, no general rule can be laid down respecting the duty of cross-examination.

HUMOR OF THE LAW.

There had been an accident. The motor car had run over a man's toes and now the injured party was claiming damages.

"What! You want \$100 for a crushed foot?" cried the motorist. "Look here, I'm not a millionaire!"

"Perhaps you ain't," replied the victim firmly, "and I ain't no centipede."—Southern Ruralist.

In a suit against a St. Louis corporation, brought by a passenger for invisible injuries to her back, the plaintiff had been required to repeat her story several times.

Learned counsel for the defendant, in his address to the jury, commented eloquently upon the plaintiff's self-contradiction, and at the climax of his denunciation shouted:

"And not once, gentlemen, did she tell the same story twice!"

Well, how would you say it?

"Ambassador Gerard," said a New York broker, "had a happy way in Berlin of chaffing the great war lords and dictators."

"A grand duke said to the ambassador at a reception:

"Germany will win this war. Then let America look out."

"How will Germany win?" said Mr. Gerard, calmly.

"With her submarines, with her gases, and, above all," said the grand duke, "with perseverance. Perseverance, Mr. Ambassador, always conquers."

"Always?" said Mr. Gerard, winking at his second secretary. "How about the hen on the china egg?"—Washington Star.

One of Washington's citizens recently saw Admiral Gleaves, the man who drove the submarines away from the Pershing flotilla, walking in civilian clothes. There is an order requiring officers to wear uniform at all times. The citizen went to Secretary Daniels.

"Mr. Secretary," he whispered breathlessly, "I just saw Admiral Gleaves in citizen's clothes. Why is he in disguise?"

"Sh!" said the Secretary. "It's the Chinese situation."

"Chinese situation?"

"Yes," replied the Secretary, in all seriousness. "Admiral Gleaves' last clean uniform did not come back from the laundry."—New York Evening Journal.

WEEKLY DIGEST

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1. Appeal and Error—Appearance.—A request by attorneys, in an action to annul a marriage, to allow defendant an extension of time in which to plead, which for all that appears was not authorized, was not equivalent to an appearance within Code Civ. Proc. § 1014.—Benson v. Benson, Cal., 169 Pac. 369.

2. Assignments—Premium Coupons.—Premium coupons, issued by soap company with soap sold, containing unrestricted promise of redemption, are good in hands of bona fide transferee for value, notwithstanding restriction against transfer.—Payne v. Lautz Bros. & Co., N. Y., 168 N. Y. S. 369.

3. Attorney and Client—Disbarment.—Disbarred attorney could not maintain mandamus commanding justice of superior court to allow him to act as counsel in suit in equity, under Rev. Laws, c. 165, § 45, as amended by St. 1914, c. 432.—Casey v. Wait, Mass., 118 N. E. 297.

4. Evidence.—That defendant, sued for money collected on judgment obtained by plaintiff, signed the satisfaction of judgment as his attorney, is some evidence of his employment as such L. O. L. §§ 1074, 1083.—Caples v. Ditchburn, Ore., 169 Pac. 510.

5. Modification of Decree.—On attorney's application to modify original decree of disbar-

ment, held, that judges of district court acted beyond their authority, and illegally, in canceling second decree, which, in effect, canceled disbarment, except in so far as it affected practice within state.—Maxey v. Polk County District Court, Iowa, 165 N. W. 1005.

6. Promoters.—Money intrusted to an attorney and member of committee of promoters by the committee, held properly treated as the money of the committee, which the attorney was not required to pay over while his services and expenses remained unpaid.—In re Marvin, N. Y., 168 N. Y. S. 555.

7. Services Rendered.—Attorney, suing his client, may have and state cause of action for money judgment on account of services rendered and money advanced, though purpose is to foreclose attorney's lien, existence of which is open to denial.—English v. Jenks, Mont., 169 Pac. 727.

8. Bailment—Gratuitous Bailee.—Failure of gratuitous bailee of diamond earrings to return one which he had lost was not a conversion; trover not being maintainable on proof of negligence, but only of misfeasance amounting to conversion.—Rubin v. Huhn, Mass., 118 N. E. 290.

9. Bankruptcy—Burden of Proof.—On a petition by a trustee to require a bankrupt to turn over money or property, the trustee is not required to prove fraud in the contracting of the debts, even though alleged.—Henkin v. Fousek, U. S. C. C. A., 246 Fed. 285.

10. Fraud.—Where an insolvent advertiser, in order to get his printing done, agreed to turn over accounts accruing each month sufficient to pay for the printing for such month, and the accounts are turned over and collected, there was no fraud on creditors for such accounts assigned over within four months of filing a petition in bankruptcy.—Fotter v. American Printing & Lithographing Co., Iowa, 165 N. W. 1044.

11. Lien.—Judgment of Colorado state court in favor of vendor and against bankrupt ordering foreclosure of vendor's lien did not establish lien, and though rendered within four months of filing of petition in bankruptcy, such lien is valid despite Bankr. Act July 1, 1898, § 67f.—Farrell v. Wysong, U. S. C. C. A., 246 Fed. 281.

12. Mortgage.—Under Bankr. Act, § 60, subd. "b," as amended by Act June 25, 1910, c. 412, § 47, subd. "a," and Civ. Code Ga. 1910, § 3260, mortgage recorded within four months before bankruptcy and before any creditor had acquired superior rights, held valid as against trustee.—Martin v. Commercial Nat. Bank of Macon, Ga., U. S. S. C., 38 S. Ct. 176.

13. Review of Orders.—An order requiring a bankrupt to turn over money to his trustee cannot be reviewed on a petition to revise, where the only question raised is the sufficiency of the evidence and there is evidence to support the order.—Henkin v. Fousek, U. S. C. C. A., 246 Fed. 285.

14. Banks and Banking—Unlawful Loan.—A loan made by a bank to its officers in violation of Rev. Laws 1910, § 270, was not void as between the bank and the debtor, who cannot

defeat a recovery on that ground.—*Schuber v. McDufee, Okla.*, 169 Pac. 642.

15. **Bills and Notes**—Cancellation.—If payee of note released maker in consideration of deed to payee's wife, and such fact was known to the assignee, who was a mere volunteer, the maker was entitled to cancellation.—*Bass v. Borries, Miss.*, 77 So. 189.

16.—Equity.—Where all the makers of a note executed it as principals, that one of them gave his note to the holder of the first note, long after the first note had matured, as collateral security for its payment, created no equity in the other makers of the first note, entitling them to object to the return of the collateral note.—*Levey v. Henderson, Cal.*, 169 Pac. 673.

17.—Evidence.—In action on note wherein defendants set up fraud in that plaintiffs, on exchange of land, agreed to take one-half of commission from each party, and accepted \$1,000 from the others, but represented that such others paid \$2,500 and so secured the note in suit, it was error to exclude the agreement by which plaintiffs accepted \$1,000 from one side.—*Zirbes v. Mousney, Cal.*, 169 Pac. 368.

18. **Brokers**—Accounting.—Plaintiff who was to have share of profits from theater for procuring owner of lots to build theater and lease it to defendants, held entitled to sue at law, and not limited to a suit for an accounting.—*Griffiths v. Von Herberg, Wash.*, 169 Pac. 587.

19.—Finding Purchaser.—Where a real estate broker introduces the purchaser to the owner, he has done all that the law requires of him to entitle him to his commission, though the owner subsequently sells the property, or a part thereof, at a reduced price.—*Ryan v. Walker, Cal.*, 169 Pac. 417.

20.—Middleman.—One employed merely to bring together persons desirous to exchange property, or to sell and buy, is a "middleman," agent for neither, and entitled to receive commission from both.—*Tracey v. Blake, Mass.*, 118 N. E. 271.

21. **Carriers of Goods**—Limitation of Recovery.—Where shipper of dog by express contract limited recovery to carrier's negligence and agreed to assume the burden of proof, and carrier departed from agreed route, it had the burden of showing that death was not due to such departure or such negligence, notwithstanding Interstate Commerce Act and Hepburn and Carmack Amendments.—*Ely v. Barrett, N. Y.*, 168 N. Y. S. 419.

22. **Carriers of Livestock**—Claim for Damages.—Stipulation of contract for intrastate shipment of horses requiring claim for damages to be in writing, verified by shipper, and delivered to carrier's agent within five days of removal of injured horse from car, was reasonable and valid.—*Fletcher v. New York Cent. & H. R. R. Co., Mass.*, 118 N. E. 294.

23.—Notice.—Provision in contract for interstate shipment of live stock that as condition precedent to suit for damages shipper shall give written notice of claim to carrier's agent within 90 days after injury, and that failure to comply therewith shall bar recovery, is valid.—*Chicago, R. I. & P. Ry. Co. v. McElreath, Okla.*, 169 Pac. 628.

24. **Carriers of Passengers**—Alighting from Car.—Railroad's grade of $2\frac{1}{2}$ to 3 per cent. does not show negligence of railroad in relation to injury to passenger when car door closed on her hand, nor require presence of brakeman at door of each car where passengers are alighting.—*MacGill-Allen v. New York, N. H. & H. R. Co., Mass.*, 118 N. E. 248.

25.—Common Knowledge.—It is common knowledge that competent motormen are negligent at times, and, fact that motorman was going at full headway does not show there could not have been sudden overfeeding of controlled by him.—*Colorado Springs & Interurban Ry. Co. v. Reese, Colo.*, 169 Pac. 572.

26.—Incompetent Employe.—A railroad company whose physicians treated an injured passenger was not liable for their negligence or incompetence, unless it knew of their unfitness.—*Denver & R. G. R. Co. v. Ptolemy, Colo.*, 169 Pac. 541.

27. **Commerce**—Newspaper Publication.—As interstate commerce is not only traffic, but is intercourse, the publication of a newspaper and its distribution from one state to another is interstate commerce.—*Post Printing & Publishing Co. v. Brewster, U. S. D. C.*, 246 Fed. 321.

28. **Corporations**—Promoters.—Unless the charter or statute law otherwise provides, and the corporation does not, subsequent to the incorporation, obligate itself to pay, it need not pay for the services or expenses incurred in promoting its incorporation.—*United German Silver Co. v. Bronson, Conn.*, 102 Atl. 647.

29.—Trustee ex Maleficio.—On an accounting to a corporation in a stockholder's suit for stock and dividends thereon held by defendants as trustees ex maleficio, dividends paid in stock or bonds and still held by defendants unconverted cannot be regarded as cash dividends.—*Du Pont v. Du Pont, U. S. D. C.*, 246 Fed. 332.

30. **Conspiracy**—Tort.—Persons having similar individual contracts with third person, who conspire together to breach them and do breach them, whether for personal gain or sinister motives, are liable therefore in action for tort in the nature of a conspiracy.—*Hendricks v. Forshey, W. Va.*, 94 S. E. 747.

31. **Constitutional Law**—Due Process of Law.—Contentions that order denying railroad company authority to continue lower rates than those charged to intermediate point, took property without due process of law because broader than the hearing, held unsound.—*Louisville & N. R. Co. v. United States, U. S. S. C.*, 38 S. Ct. 141.

32.—Selective Draft.—Act May 18, 1917, c. 15, providing for raising an army by means of a selective draft does not impose involuntary servitude, in violation of Const. Amend. 13.—*Arver v. United States, U. S. S. C.*, 38 S. Ct. 159.

33. **Contracts**—Exclusive Rights.—Where the plaintiff, who possessed a business organization adapted to the placing of such designs and endorsements as plaintiff might make or approve, entered into agreement for exclusive right to handle and sell all such or license others to market them, and take out copyrights, and in return defendant was to have one-half of "all profits and revenues" to be accounted

for monthly, an agreement that plaintiff would use all reasonable efforts to market such endorsements and designs was implied, and the contract is not void for want of mutuality and consideration.—*Wood v. Lucy, Lady Duff-Gordon*, N. Y., 118 N. E. 214.

34.—**Rescission.**—Where plaintiff was induced to pay defendant's agent on latter's false representations that voting contest conducted by defendant was going to be failure, and that if plaintiff would pay certain amount he would win automobile, etc., misrepresentations were not of a character to entitle plaintiff to rescind.—*Brown v. C. A. Pierce & Co.*, Mass., 118 N. E. 266.

35. **Covenants—Building Restriction.**—A restriction in a deed against erection of any "building offensive to good neighborhood" does not apply to a garage for storage of 29 cars, where an owner may store the car which he drives.—*Hammond v. Constant*, N. Y., 168 N. Y. S. 394.

36. **Creditor's Suit—Attachment.**—Defendant's right to recover damages against trust company for breach of agreement to lend money is a "right which cannot be reached to be attached or taken in execution in an action at law," within Rev. Laws, c. 159, § 3, cl. 7.—*Digney v. Blanchard*, Mass., 118 N. E. 260.

37. **Damages—Interference with Work.**—Where defendant, owner of theater, who had contracted with plaintiff for installation of metal work, wrongfully prevented plaintiff from completing work, verdict for plaintiff for contract price, less cost of completing work by defendant, was justified, if nothing further appeared.—*Millen v. Gulesian*, Mass., 118 N. E. 267.

38. **Divorce—Endangering Health.**—A man cannot obtain a divorce from his wife on the ground that her profane and abusive language endangered his health.—*Moir v. Moir*, Iowa, 165 N. W. 1001.

39. **Dower—Seisin.**—Where land of which a husband dies seized is subject to a valid oil and gas lease yielding rental, widow is dowable of the reversion and rent as an incident of the reversion.—*Campbell v. Lynch*, W. Va., 94 S. E. 739.

40. **Druggists—Warranty.**—Where defendant manufacturing chemist sold to a veterinary hog cholera virus and serum for use on hogs, and he used it on plaintiff's hogs, which were thereby killed, the defendant was not an insurer of the remedy if administered according to directions, especially where it specifically warned of the dangerous character of the substance.—*Brown v. H. K. Mulford Co.*, Mo., 199 S. W. 582.

41. **Election—Domicile.**—Where one during the life of his parents married and moved out of the ward, his *prima facie* domicile was the ward to which he moved and to keep his domicile in his ancestral ward for purpose of voting, his intent to return must be based on something more definite than intent to return "if things turned out as he thought they would," under Pub. St., 1901, c. 31, § 9.—*Felker v. Henderson*, N. H., 102 Atl. 623.

42. **Electricity—Contributory Negligence.**—Painter, employee of contractor to paint iron stack, who rested ladder on roof of power company's substation, where there were exposed power wires, held guilty of negligence contributing to his death by shock.—*Chartier v. Barre Wool Combing Co.*, Mass., 118 N. E. 263.

43. **Eminent Domain—Special Damages.**—In an action by a corner lot owner for special damages on account of the street railway track constructed close to the curb along the line of the lot, it was improper to admit evidence of the jar occasioned by passing street cars; such inconvenience being common to all.—*Fairchild v. Oakland & E. S. Ry. Co.*, Cal., 169 Pac. 388.

44. **Fish—License.**—Where privilege of carrying on business of growing oysters was granted town licenses by selectman under act of Legislature, until objection is made by commonwealth, and forfeiture insisted on by it, canal company cannot rely on violation of Rev. Laws, c. 91, § 107, as to assignment of license, as excuse for refusing compensation for injuries to fisheries.—*Henshaw v. Boston, Cape Cod & New York Ship Canal Co.*, Mass., 118 N. E. 276.

45. **Fraud—Damages.**—Where a purchaser buys what the vendor states to be 112.5 acres of land at \$50 per acre and there are only 78.76 acres, the vendee can recover the excess paid in an action for fraud, even though he sold the same for as much as he paid without knowledge of the shortage.—*Purdy v. Underwood*, Ore., 169 Pac. 536.

46. **Fraudulent Conveyance—Oral Agreement.**—Where an insolvent advertiser, in order to get his printing done, orally agreed to turn over sufficient account accruing each month to pay for printing for that month, and the agreement was carried out and the accounts collected, there is no fraud on creditors, no matter how vague the agreement, or that creditors had no notice.—*Potter v. American Printing & Lithographing Co.*, Iowa, 165 N. W. 1044.

47. **Gas—Res Ipsa Loquitur.**—That gas escaped from a pipe in street would not establish liability of defendant gas company, and therefore doctrine of *res ipsa loquitur* was inapplicable.—*Di Sandro v. Providence Gas Co.*, R. I., 102 Atl. 617.

48. **Gift—Inter Vivos.**—Though donor is afflicted with incurable malady, and knows he cannot get well, where gift is made to take effect immediately on delivery to donee, gift is *inter vivos*, though donor may be upon deathbed.—*Harmon v. Harmon*, Ark., 199 S. W. 553.

49. **Promissory Note.**—Where one gave note payable on demand, as a gift, the object being to leave the payee money by note instead of by will, it is not good as a "gift *inter vivos*."—*Wood v. Sturges*, Miss., 77 So. 186.

50. **Grand Jury—Composition of.**—Socialists held denied no constitutional or statutory rights because grand jury was composed exclusively of members of other parties and of property owners.—*Ruthenberg v. United States*, U. S. S. C., 38 S. Ct. 168.

51. **Highways—Obstruction.**—In prosecution for obstructing cartway, in absence of evidence of dedication, or of adverse continuous user by prosecuting witness, defendant could not be guilty, where obstruction was on road where it crossed his land.—*State v. Lance*, N. C., 94 S. E. 721.

52. **Insurance—Cancellation.**—Insurance agent, requested to "place" insurance on property, without indicating the companies, held authorized, without notice given, to cancel one policy on the request and to issue another in its stead, where insured did not insist on five days' notice of cancellation.—*Hartford Fire Ins. Co. v. McKinley*, Fla., 77 So. 226.

53. **Damages.**—General rule as to loss recoverable under Massachusetts standard fire policy for partial destruction is difference between value of building before fire and value of part remaining.—*Second Society of Universalists in Town of Boston v. Royal Ins. Co. of Mass.*, 118 N. E. 292.

54. **Estoppel.**—In applicant for credit insurance did not see fit to read applications or conditions of policies to which applications referred, rights of parties are not affected.—*Cau- man v. American Credit Indemnity Co. of New York*, Mass., 118 N. E. 259.

55. **Evidence Aliunde.**—Where words "manufacturing, handling, or shipping" of stock of lumber manufacturing plant in policy were of doubtful application, extrinsic evidence was admissible to show true meaning of parties.—*Mountain Timber Co. v. Lumber Ins. Co. of New York*, Wash., 169 Pac. 591.

56. **Fidelity Bond.**—That liability may attach to a fidelity bond conditioned against larceny or embezzlement of an employe, it is not necessary for employer to put in evidence

sufficient to convict of "larceny" or "embezzlement" as defined by state laws.—National Surety Co. v. Williams, Fla., 77 So. 212.

57.—**Iron Safe Clause.**—A complaint in an action on an insurance policy, averring that defendant instructed plaintiff that he need not comply with the portion of said policy known as the "iron-safe clause," was sufficient, without alleging when, how, or by whom the instruction was given.—Cohen v. Home Ins. Co., Del., 102 Atl. 621.

58.—**Notice of Injury.**—Accident policy requiring notice of injury within 30 days, unless insured was unconscious or disabled, is not breached by insured's failure to give such notice during some 7 days following accident, before plaintiff became physically disabled.—Kendall v. Travelers' Protective Ass'n of America, Ore., 169 Pac. 751.

59.—**Special Agent.**—Where agent of credit insurance company represented himself to one who desired to secure insurance as special agent, person desiring insurance was bound to ascertain nature and extent of authority.—Cauzman v. American Credit Indemnity Co. of New York, Mass., 118 N. E. 259.

60.—**Total Disability.**—That traveling salesman injured by railroad collision continued his journey and made a second journey two days later did not as matter of law show that his disability was not immediately total within terms of accident insurance contract.—McKay v. Minnesota Commercial Men's Ass'n, Minn., 165 N. W. 1061.

61.—**Waiver.**—A provision in a policy of life insurance that no conditions could be waived except by endorsement by certain officers cannot effect the waiver of a condition in the application that the policy should not take effect until the premium was paid.—Whipple v. Prudential Ins. Co. of America, N. Y., 118 N. E. 211, 222 N. Y. 30.

62. **Internal Revenue — Stock Dividend.**—A stock dividend is "capital" for the purpose of the Income Tax Act of 1913 and is not taxable as "income," as the interests of the stockholders are not thereby increased; the only change being in the evidence representing that interest.—Towne v. Eisner, U. S. S. C., 38 S. Ct. 158.

63. **Joint Adventures — Participant.**—Where attorney for committee of promoters was a participant in the joint enterprise, held that he must stand his proportionate share of value of his services.—In re Marvin, N. Y., 168 N. Y. S. 555.

64. **Landlord and Tenant — Constructive Eviction.**—Where lessor of store and family suites collected rent from lessee's tenants, and gave them notice forbidding them to pay further rent to lessee, latter was not constructively evicted or ousted.—Aguglia v. Cavicchia, Mass., 118 N. E. 283.

65.—**Eviction.**—The prosecution to judgment of unlawful detainer by a landlord, without malice, was not an eviction entitling the tenant, on reversal, to damages, where no writ to dispossess was issued, and tenant moved in compliance with judgment.—Black v. Knight, Cal., 169 Pac. 382.

66.—**Damages.**—On breach of landlord's covenant to make repairs, measure of damages in difference between rental value of premises as they were, and what it would have been had they been put and kept in repair.—Murrell v. Crawford, Kan., 169 Pac. 561.

67.—**Lease.**—In a building lease providing that the basement was to be "properly waterproof," the term "waterproof" is a relative expression, meaning that the walls and floor of the basement were to be so constructed as to keep out water and dampness under such circumstances and weather conditions as might have been reasonably anticipated.—Ozark Grocery Co., v. Crandall, Ark., 199 S. W. 551.

68. **Libel and Slander — Malice.**—Publication of libel or slanderous charge of adultery creates legal presumption that charge was false and made without legal excuse—that is, with malice—and plaintiff, in absence of proof of truth of charge or that it was privileged communica-

tion, may recover general damages.—Craney v. Donovan, Conn., 102 Atl. 640.

69. **Livery Stable and Garage Keepers — Damages.**—Statement by one who hired taxicab in response to driver's question that hospital to which she desired to go was out H. street on B. avenue, was not direction that he should return on H. street, so as to preclude recovery for injuries received while so returning.—Hathaway v. Coleman, Cal., 169 Pac. 414.

70. **Mandamus — Ballot by Soldier.**—Where soldier had right to vote in certain district, but by mistake his ballot was sent to another district, mandamus will lie to compel delivery of such ballot to proper board, and canvass and return thereof by such board.—People ex rel. Fiske v. Inspectors of Election of Certain Districts of City of Mt. Vernon, N. Y., 168 N. Y. S. 398.

71. **Master and Servant — Involuntary Servant.**—Silence of owner of automobile, even if implied assent to terms of hire by bailee, who proposed that, if he put on his driver, owner would have to be responsible, was insufficient to make driver involuntary servant of owner.—Melchionda v. American Locomotive Co., Mass., 118 N. E. 265.

72.—**Safe Place to Work.**—While a master may perform his duty of furnishing reasonably safe place for work by use of mechanical device, yet if such device require human agency to render place safe, master is bound to provide such agencies, and otherwise fails to render place reasonably safe.—Weber v. Webster City, Iowa, 165 N. W. 1009.

73.—**Scope of Employment.**—An employee in a wood working mill held not to have been within the scope of his employment in taking a fire extinguisher and climbing a ladder to another room in which there was a fire, but to have acted as a volunteer and defendant owed him no duty.—Delano Mill Co. v. Osgood, U. S. C. A., 246 Fed. 273.

74.—**Warning.**—In case of a yardmaster killed, while standing between two tracks, by a car switched onto one of them striking him, no negligence is shown; the usual warning by a halloo being given by several as soon as any one had reason to think there was danger.—Healy v. Erie R. Co., N. J., 102 Atl. 629.

75.—**Workmen's Compensation.**—Where the master had not elected to come under the Workmen's Compensation Act, a servant was injured by falling down stairway, allegations that she was familiar with stairway, knew it was usually lighted and where light was, and could have had the light turned on, come with defenses of assumption of risk and contributory negligence, and were foreclosed to the master by section 1, pt. 1.—Wulff v. Bossler, Mich., 165 N. W. 1048.

76. **Mines and Mineral — Coal in Place.**—Ten-year lease of land and specific vein of coal therein, with mining rights, without warranty of acreage or quantity of coal, providing payment of certain price per ton mined, and guaranteeing a minimum payment, was a sale of coal in place on condition of removal within term.—National Coal Co. v. Overholt, W. Va., 94 S. E. 735.

77. **Municipal Corporations — Emergency.**—Under municipal ordinance requiring standing vehicles to be not more than two feet distant from the curb, except in emergency, where of only 22 feet in which to stand his vehicle, and intended to alight and move the wheels of the buggy over to the curb, there was such emergency that, in an action for injuries when his buggy was struck by defendant's automobile, it was improper to refuse instruction that he was guilty of negligence if any wheel on the plaintiff, driving up to the curb, had a space curb side was more than two feet from the curb.—Collins v. Marsh, Cal., 169 Pac. 389.

78. **Negligence — Employers' Liability Act.**—Contributory negligence of injured employee is not a defense under Employers' Liability Act, where employer, by violating statute enacted for safety of employees, contributed to injury or death; in other cases contributory negligence is not complete defense.—E. L. Bruce Co. v. Yax, Ark., 199 S. W. 535.

79. Partnership — Contract.—Where one bought a herd of cattle and turned them over to another, who was to feed them three years at his own expense, the title to remain in the former and the proceeds of all sales to go to the former until he was reimbursed, and then remainder to be divided equally, there was no partnership, within Rev. Codes, § 5466; no such intention existing.—*McCormick v. Stimson*, Mont., 169 Pac. 726.

80. Physicians and Surgeons — Practicing Medicine.—Where plaintiff stated she could remove superfluous hair, and undertook to treat condition with electric needle, she "practiced medicine" without being licensed physician, thus violating Public Health Law, art 8, and could not recover any balance due.—*Engel v. Gerstenfeld*, N. Y., 163 N. Y. S. 484.

81. Principal and Agent — Mutual Mistake.—Where trust company executed assignment of mortgage, and its solicitor fraudulently inserted description of an additional mortgage and collected the amount due on both mortgages, there was a mutual mistake, and assignee might rescind and recover of trust company the whole amount paid to the solicitor.—*Hubing v. Liberty Trust Co.*, N. J., 102 Atl. 636.

82. Ratification — Where a car was placed with an agent for sale for \$800 cash, and the agent exchanged the car and got \$50 cash, and sent \$400 to the principal telling him he had exchanged and received that amount on the trade, which the principal accepted conditionally, there was no ratification of the exchange, where there was no connection shown between the \$50 and the \$400, and the principal did not know with whom the car had been exchanged, or the conditions.—*Hutchinson v. Scott, Magner & Miller*, Cal., 169 Pac. 415.

83. Ratification — Where one ordered material on the credit of another without authority, and the latter did not repudiate the bill for six months after learning thereof, and during such delay the time for filing a lien on the work expired, the account is ratified.—*Northwestern Lumber Co. v. Cornell*, Wash., 169 Pac. 590.

84. Railroad — Consolidation.—A consolidation of railroad companies which has been in effect for 20 years unchallenged by the authorities of the states concerned will not be held invalid as against the laws of such states in a suit between private parties.—*Railway Steel Springs Co. v. Chicago & E. I. R. Co.*, U. S. D. C., 246 Fed. 338.

85. Crossing Accident — That an automobile driver, familiar with a railroad crossing where the view was somewhat obstructed, could have stopped a safe distance from the track, stilled noise of the automobile engine and listened, but failed to do so, was, as matter of law, contributory negligence barring recovery for injury to the automobile.—*Rayhill v. Southern Pac. Co.*, Cal., 169 Pac. 718.

86. Receivers — Attorney at Law.—A lawyer appointed as receiver is expected to act as his own counsel, except under extraordinary circumstances.—*Balley v. Giormine*, N. J., 102 Atl. 634.

87. Reformation of Instruments — Obvious Mistake.—Where there is no obvious mistake requiring correction to make all parts of instrument harmonious, court of law will read it as written, and will not reform it by exercising functions of court of equity.—*Kimble v. City of Newark*, N. J., 102 Atl. 637.

88. Sales — Breach of Contract.—In action for breach of contract for sale of welding machine by placing other machines in same county, proof of profits from welding work done by other machines was admissible in estimating plaintiff's damages.—*Lewistown Iron Works v. Vulcan Process Co.*, Minn., 165 N. W. 1071.

89. Evidence — A letter, "We want the rest of those bottles as soon as you can send them in, and see no valid reason why you should be holding them," written in December, to which there was no reply, or action taken, forecloses any claim by the buyer that he did not know until March that the sellers had breached their contract, and hence the market price in March

cannot be considered in fixing damages for non-delivery.—*Schultz v. Glickstern*, N. Y., 168 N. Y. S. 490.

90. Identifying Property — A sale of "50 tailenders" of a herd of about 400 cattle sufficiently identified the property to be conveyed.—*Adams v. Guiraud*, Colo., 169 Pac. 580.

91. Speculative Damages — In action for purchase price of machinery, purchaser could not claim damages sustained by reason of non-user of capacity of its plant as a whole during canning season, due to defects in certain machinery; such damages being speculative and not in contemplation of the parties.—*Burrell v. Southern California Canning Co.*, Cal., 169 Pac. 406.

92. Specific Performance — Unsigned Memoranda.—Where under an unsigned memoranda of lease defendants went into possession and made improvements under promise of the execution of a lease, they cannot enforce specific performance where the memoranda left for future settlement, terms and payment of rents, leveling of land, and purchase of plaintiffs' implements.—*Durst v. Jolly*, Cal., 169 Pac. 449.

93. Street Railroads — Look and Listen.—Where plaintiff before crossing street car track looked first to the south and saw a car, and then to the north, but did not look again before crossing, and was struck, he was guilty of contributory negligence as a matter of law.—*Hubbard v. Atlantic Coast Electric Ry. Co.*, N. J., 102 Atl. 632.

94. Telegraphs and Telephones — Notification to Sender.—A telegraph company is not liable for failure to notify sender of receipt of message by addressee except in case of repeated message.—*Western Union Telegraph Co. v. Hazlehurst Oil Mill & Fertilizer Co.*, Miss., 77 So. 187.

95. Tender — Place of.—Where a note gave the option of paying money or delivering property at maturity, the money payable at a certain bank, but nothing being said as to place of delivery of the property, the depositing of the property at the bank to be delivered to the payee was a good tender.—*Hennessy v. Woodring*, Mo., 199 S. W. 564.

96. Trust — Laches.—Suit brought 40 years after issuance of railroad bonds secured by mortgage and 10 years after maturity to charge another railroad company with personal liability as trustee as having succeeded to the mortgagor's lands, held barred by laches.—*Waller v. Texas & P. Ry. Co.*, U. S. S. C., 38 S. Ct. 142.

97. Notice — Firm of shoe manufacturers, who, with notice of lack of authority in testator's son and widow to continue retail shoe business, sold them goods, held not entitled to a proportionate part of fund by impressing trust on proceeds of entire stock sold by administrators *de bonis non*.—*Donnelly v. Alden*, Mass., 118 N. E. 298.

98. Parol Evidence — Where a mother delivered to her son a sum of money, and orally instructed him to hold and disburse for her support, to pay her debts during her lifetime, and, after her decease, the debts of her estate, and to divide the remainder among certain parties named, a trust by parol was created in favor of the beneficiaries.—*McElveen v. Adams*, S. C., 94 S. E. 733.

99. Vendor and Purchaser — Notice of Lien.—Where purchaser before maturity, etc., of notes given partly for purchase price of land, had knowledge by recitals therein that vendees, husband and wife, occupying premises as a homeestead, gave deed to vendor, who in turn deeded to husband, held purchaser was entitled to judgment for full amount of notes, but only to lien on premises for amount owing on land at date notes were executed.—*Thomas v. Ash*, Tex., 199 S. W. 670.

100. Wills — Expert Testimony.—Permitting expert whose opinion would naturally have much weight to express opinion as to whether man in testator's condition lacked ability to comprehend and understand disposition of property by will, held prejudicial.—*In re Jahn's Will*, Iowa, 165 N. W. 1021.

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JURISDICTION OVER CHILD BECAUSE OF ITS PRESENCE IN STATE WHILE ITS MOTHER IS SUING FOR DIVORCE UPON CONSTRUCTIVE SERVICE.

The case of Burns v. Shapley, 77 So. 447, decided by Alabama Court of Appeals, bristles with all sorts of questions regarding distinctions between presence in a state of children so as to make them wards of a court and of domicile in another state because of parentage of the father.

In this case it appears that a husband and wife established a residence in Alabama and there was born to them there a child. The mother left her husband, let it be said, with such justification as not to make the leaving amount to desertion and established her residence in Montana. There a second child was born to her, begotten by the father in Alabama. Having taken the first child with her from Alabama, either by express or tacit consent of the father, but with no expectation of suit for divorce being brought, the wife had the custody in Montana of both children. She brought suit for divorce in Montana on service by publication. The husband appeared by counsel, decree for divorce was granted, and the court made an order awarding the custody to him of both children, conditioning that they "be kept in the jurisdiction of this (Montana) court."

The husband after the granting of said decree took the children to his residence in Alabama. Afterwards the Montana court upon motion by the wife and without any notice to the husband, amended its decree regarding custody so as to give to the mother such custody, the children to be kept in Montana. The wife appears to have remarried intervening the making of the two orders for custody, and after the granting of the second order brought in Alabama habeas corpus for recovery of the posses-

sion of the children. The Court of Appeals of Alabama held that by virtue of the order of Montana District Court she was entitled to judgment.

The Alabama Court took the position that the appearance by the husband to the action, for divorce placed the children "under the sovereign guardianship" of Montana and its courts had jurisdiction to pass upon all questions regarding their custody, and their rulings were entitled to respect under the faith and credit clause of the Constitution.

But is this true? Whatever may be said as to the wife acquiring a domicile in Montana so as to entitle her to sue in its courts, in an action to free her from an existing relationship which as long as it continued made her domicile in Alabama, it seems evident that the domicile of the children was in Alabama, even up to the very day decree for divorce was granted. Did such decree, *eo instanti*, work a change of domicile for the children?

It may be conceded, that the decree, so far as the wife was concerned had relation back to the time of her residence in Montana, giving her a new domicile, but as she was acting for herself and not for the children prior to the time she acquired the new domicile, their status was not affected. During this entire period, the domicile of the husband, as head of the family, determined the domicile of the children. We do not believe enabling acts aim at changing this rule.

We do not attribute any importance to the provision of the decree forbidding removal of the children to another state, because that is swallowed up in the general question of jurisdiction. More pertinent is the inquiry of the effect upon the children of submitting the matrimonial *res* to the Montana court. Can any principle of estoppel against a husband preclude him from asserting his rights regarding his children?

The Alabama court says: "The theory upon which the court proceeds in such

(custody of children) cases is that the custody and control of the parent over his minor children is a trust committed to him by the state, and this trust is dominated by the supreme guardianship of the state as *parens patriae* of all infants within its border and when the parent abuses the trust so as to endanger the welfare of the child, in such sort as to hamper or retard its development into a good citizen, the interest of society requires the state to assert its supreme guardianship and protect its ward."

Here we deduce the conclusion that the state ought not to have any responsibility over a child if it is a foreign child, unless, at least, the child is there because it has been abandoned. Can a child be said to be abandoned when it has been taken or is in process of being taken, as in this case, from a foreign state to that of the child's domicile? Whether it becomes a neglected or abandoned child there, is for the state of domicile to say. Before it is taken the foreign state cannot act as *parens patriae*.

One of the cases cited by Alabama Court of Appeals seems almost, if not quite, on all fours with the case before it. See Slack v. Perrine, 9 App. D. C. 128.

In that case the court said: "If the contention as regards the loss of jurisdiction by reason of the removal of the children from New Jersey was sustained by the court, what assurance have we that our judgment in this case may not be equally vain with that of the Chancery Court of New Jersey? The children might be spirited away into Maryland or Virginia and the same contention made in the courts of those states as to the effect of the judgment in this jurisdiction. We apprehend that those courts would give effect to the decree herein so far as the rights of the contestants are concerned. We will, at least, furnish them no precedent for different action."

This observation has no other relevancy than showing, that thereby it appears that the rule of estoppel against a parent was enforced, when he became bound as a for-

mer husband. This ignores both parental duty and the obligation of the state as *parens patriae*. If in the District of Columbia or in New Jersey, as the case may have been, there was a duty regarding children having a domicile there, the court should have asserted it in the interest of infants, whosoever might have been the parties in pending or prior proceedings. And jurisdiction over the matrimonial *res* was not pertinent regarding jurisdiction as to custody of children. This was *res inter alias acta*.

NOTES OF IMPORTANT DECISIONS.

INTOXICATING LIQUORS — TRAVELER CARRYING AS PART OF PERSONAL BAGGAGE.—In *Lucchesi v. Com.*, 94 S. E. 925, decided by Virginia Supreme Court of Appeals, it is held that a traveler bringing into Virginia more than a quart of liquor from a point outside, for his personal use, was properly convicted under a statute forbidding such transporting and that upon his trial his suitcase taken from him with liquor therein could be retained to be used as evidence on his trial.

The principle of personal search of one legally arrested has long been held, and what is discovered may be used as evidence against him. Even if seizure of his goods is illegal a great array of cases supports the proposition that this does not make what is discovered inadmissible as evidence.

It is said: "The law appoints the remedy for redress of the wrong, but the exclusion of the evidence incriminating the defendant is not within the scope of the remedy or the measure of redress."

So far as the liquor being brought in for personal use and not for manufacture or sale was concerned, while it was said the question was argued with great force and vigor, yet the recent case of *Crane v. Campbell*, 38 Sup. Cit. 98, handed down in November, 1917, held that it was no violation of constitutional rights for a state statute so to declare.

In the *Crane* case it was said: "From our numerous decisions upholding prohibition legislation, the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States, which no state may abridge. A contrary view

would be incompatible with the undoubtedly power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at will." It boots little for one to suggest that a short cut to a conclusion not necessarily embraced is assumed. Our highest court has uttered what may be a mere *ipse dixit*, but an *ipse dixit* by such a tribunal may be itself a principle, or to be accepted as a principle, just as a statute may create a new principle. Let us say too, that we greatly welcome this *ipse dixit*. It prevents or helps to prevent subterfuges in enforcement of prohibitory legislation.

LARCENY—APPROPRIATION BY CONSUMER OF WATER FROM PIPE OF PUBLIC SERVICE COMPANY.—It may not be of essence in larceny, that water in the possession of a public service company is there as its property or is there as bailee thereof for a public purpose, but it may be important in general law that the distinction should be preserved.

Is it, however, in fact or in principle larceny from a possessor of water which has been lawfully put in a reservoir for beneficial distribution among those entitled to it, this distribution being by a public service company operating under a franchise?

Oklahoma Criminal Court of Appeals held that for one to divert water from the pipes of such a company so that it will not be charged to him, is taking the company's property by a trick amounting to larceny. *Clark v. State*, 170 Pac. 275.

The Court likens running water to "wild animals, birds and fishes, which before capture and confinement belong to no one, but after capture belong to him who captures them."

But this illustration is not strictly analogous. There is no private capture in a public service company taking water generally for a beneficial purpose. It takes it in trust to apply to such a purpose. It is not the water as property that is considered, but it is its application in a particular way that is the main consideration. When it impounds, it does not capture a thing. It is still property of the public about to be used for a public purpose. If the purpose is abandoned, the impounding becomes unlawful, and the water should be released.

It may be that, if one should develop water on his own land so that it belongs to him, the unlawful appropriation thereof by another might be larceny. Suppose rates of a water com-

pany are to be fixed by a commission, and the water a company serves to its patrons is not developed on its own land, but is taken from a stream, there might be a different rate charged in one case than the other. In both cases a public service comes under regulation, but rates in the two would be based on wholly dissimilar grounds. In one case there is use of public property; in the other there is use of private property. The case of taking water from a public service company and taking from it gas or electricity might be very different.

CRIMINAL LAW—INSTRUCTIONS CURING ERROR IN WRONGFUL ADMISSION OF EVIDENCE.—*Taylor v. Com.*, 91 S. E. 795, decided by Virginia Supreme Court of Appeals, was a prosecution for felonious assault by a husband on his wife. A dying declaration by the wife was admitted in evidence and afterwards withdrawn, the court charging the jury that they should efface it from their minds. This direction was given some hours later, there being a noon recess intervening. The dying declaration was made after the wife had taken poison which caused her death.

In the declaration all instances of the assault upon her were stated in revolting detail, she saying in addition that she had a hard time with him, had received frequent beatings and that on the night after she had taken the poison he slept in the same bed with her while others were working to try to save her life.

There was testimony about the appearance of the body showing bruises, vomiting by the wife, and such other testimony showing heartless cruelty by the husband, all of which he denied in his testimony wholly unsupported.

The court ruled that the instruction given by the trial judge cured the error, especially as the jurors said individually they would not allow the dying declaration to prejudice the defendant.

It was said that: "The courts of a few of the states make a distinction between civil and criminal cases, requiring much more strictness in the application of the rule in criminal cases. This distinction, however, is not, as we believe, generally recognized, and is without substantial foundation."

It seems to us, that, if instructions could not take away injury of admission in any case that might be imagined, it could not in such a case as was before the court. It was a case of piling horror upon horror and any court ought to know the impression this dying declaration made was impossible to be obliterated. The harder the struggle of an honest mind to get

rid of it, the more vividly it would remain. Indeed, the only theory of its doing no harm was in the proof against defendant being so overwhelming it was scarcely a make weight in leading to the verdict. But courts cannot proceed on any such theory as this, especially in a criminal case. There is, too, a substantial distinction between criminal and civil cases in such things, because of the necessity of convincing the jury beyond a reasonable doubt. The balance in a prisoner's favor, howsoever little it may seem to be worth, must be considered.

LIMITATIONS OF THE TREATY-MAKING POWER OF THE PRESIDENT OF THE UNITED STATES WITH THE CONCURRENCE POWER OF THE SENATE—PART II—THE APPLICATION OF THESE PRINCIPLES TO THE CONTROVERSY WITH JAPAN AND THE CALIFORNIA LAND LAWS.*

All rights of the citizens of the states of the United States which were not granted to the federal government and embodied in the Constitution of the United States are retained in them and may be exercised through Acts of the legislature of the several states. There is no grant of authority in the Constitution of the United States authorizing Congress to enact laws specifying who may and who may not hold or purchase the title, or hold and lease the uses of lands owned by citizens of the United States. If the people of the United States had granted this authority in the Constitution, then Congress could pass a constitutional law denying any alien the right to purchase and own land used for agricultural purposes, or lease the use of agricultural lands lying within the boundaries of the several states over which they now exercise jurisdiction.

*Part I of this article appeared in last week's issue, page 172.

Article I of the treaty between the United States and the Empire of Japan, proclaimed April 5th, 1911, reads:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, and employ agents of their own choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

Therefore, since such rights have not been granted by the Constitution to Congress, but retained by the people, they have the legal right to enact state laws, which prohibit aliens who are ineligible to become citizens of the United States, from owning lands used for agricultural purposes and from leasing the same for a period of more than three years.

These provisions of the California Land Tenure Act¹ complained of are the following:

An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this state, providing for escheats in certain cases, prescribing the procedure therein, and repealing all acts and parts of acts inconsistent or in conflict herewith.

The people of the State of California do enact as follows:

Section I. All aliens eligible to citizenship under the laws of the United States may acquire, possess, enjoy, transmit and inherit real property, or any interest therein, in this state, in the same manner and to the same extent as citizens of the United States, except as otherwise provided by the laws of the state.

Sec. 2. All aliens other than those mentioned in Section One of this Act may acquire, possess, enjoy and transfer real prop-

(1) Approved May 19, 1913. In effect August 10, 1913. (See Statutes of California, 1913, chapter 113).

erty, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such alien is a citizen or subject, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

Sec. 3. Any company, association or corporation organized under the laws of this or any other state or nation, of which a majority of the members are aliens other than those specified in Section One of this Act, or in which a majority of the issued capital stock is owned by such aliens, may acquire, possess, enjoy and convey real property, or any interest therein, in this state, in the manner and to the extent and for the purposes prescribed by any treaty now existing between the government of the United States and the nation or country of which such members or stockholders are citizens or subjects, and not otherwise, and may in addition thereto lease lands in this state for agricultural purposes for a term not exceeding three years.

The issue raised by the enactment of the California Land Tenure Act (1913) cited above, has been stated by Hon. Frank B. Kellogg, after citing §§ 2 and 3 of the California Act and Article I of the treaty between Japan and the United States (1911), cited above, in the following language:

The question raised, which has received such wide discussion by publicists and journalists, is whether a state may, in violation of a treaty between the United States and a foreign power, regulate the ownership of real estate within its borders by citizens of such foreign country.

I shall not stop to discuss the question of whether the treaty with Japan does give to her citizens within the United States the right to own real estate. It gives them the right to carry on trade, to own houses, manufactures, warehouses and shops, and to lease land for residential and commercial purposes. If citizens of Japan have any right to own real estate in California, it is difficult to see how this law takes away such right, because it provides in substance that such aliens may acquire, possess, enjoy and transfer real estate in the manner and to the extent and for the purposes prescribed by any treaty.

But the question has been squarely raised by the declaration of the Legislature of California, which was intended and understood by the public generally to mean that California claimed such right, notwithstanding any treaty provisions with the federal government.²

The foregoing is a statement of the problem by Hon. Frank B. Kellogg. In his address cited above he undertakes to show that the power vested in the President and with the concurrence power of the Senate to make treaties is very broad, and sufficiently broad to repeal and annul the Land Tenure Acts of California, or any similar acts that might be passed by other states. We undertake in this paper to refute this position.

The Land is the State.—In the United States where a citizen of a state dies without heirs and intestate, his personal property as well as his realty,³ and generally all his property rights, escheat to the state.⁴

Hence, where a state has passed title of land to a purchaser, and likewise when the United States has sold land to a citizen of a state, and at some point in the line of descent of the title, a holder thereof dies without heirs and intestate, not only the title to the realty, but also that of the personal estate of the deceased passes to the state. The state, therefore, at all times owns a contingent interest in the lands and personal property owned by its citizens. On the other hand, the federal government has no such interest.

Even where, to evade the law prohibiting an alien from holding land, an alien purchases real estate in the name of a trustee on an express trust to permit the alien to take and receive rents and profits, the interest in such trust belong to the state.⁵

In the United States property escheats directly to the state as the sovereign power

(2) Address of Hon. Frank B. Kellogg, Report Am. Bar Assn. 1913, pp. 332-333.

(3) Johnson v. Spicer, 107 N. Y. 185.

(4) Johnson v. Spicer, 107 N. Y. 185.

(5) Liggett v. Dubois, 5 Paige (N. Y.) 114; Hubbard v. Goodwin, 3 Leigh (Va.) 492.

within whose jurisdiction it is situated,⁶ unless the state has by statute directed otherwise.⁷ In some states the statutes provide that the escheat shall be to the county,⁸ or town,⁹ where the property is situated. Land held by grant from the general government in a territory escheats to the United States,¹⁰ unless prior to the escheat the territory has been admitted as a state.¹¹

In Canada property escheats to the province in which it is situated, and not to the Dominion.¹²

It is to be noted here that under the British Contract of North America, under which the government of the Dominion of Canada is governed, there are no constitutional limitations, while in the United States our government is administered under dual forms of constitutional limitations, those of the states and that of the United States.

Thus, neither by the proper exercise of the treaty-making power of the Dominion government of Canada, nor by that of the United States, is either the government of Canada or of the United States vested with any authority by treaty to control or limit the control of the title or leases of lands of citizens of the states, but, on the contrary, the absolute control of the same is vested in the legislative authority of the citizens of the states.

Not only is there no authority vested by the Constitution in Congress to enact laws undertaking to control the title to lands or leases thereof, or even of that of personal property, but also the Law of Escheat of real and personal property shows conclusively, in its development in the United States and the states thereof, that Congress has no authority to pass laws undertaking

(6) *State v. Ruder*, 5 Neb. 203; *Hamilton v. Brown*, 161 U. S. 256.

(7) *Haigh v. Haigh*, 9 R. I. 26.

(8) *Meadowirth v. Minnehago Co.*, 191 Ill. 504; *Pacific Bank v. Hannah*, 90 Fed. R. 72.

(9) *Haigh v. Haigh*, 9 R. I. 26.

(10) *Church of Jesus Christ v. U. S.*, 136 U. S. 1.

(11) *Ethridge v. Doe*, 18 Ala. 565.

(12) *Attorney General v. Mercer*, 8 App. Cas. 767.

to control the title of personal and real property within the jurisdiction of the states, and has never undertaken to exercise such authority, outside of levying taxes for national purposes.

Social and Economic Phases of the Problem.—The basis for the public sentiment, which is expressed by the vote of the General Assembly in 1913, in passing the land tenure acts prohibiting aliens incapable of becoming citizens of the United States from purchasing and leasing lands in the state of California for a period exceeding three years, by the extraordinary majority of 107 for to 5 against, may perhaps be fairly stated in the language of Mr. McFarland, correspondent of Collier's, on June 7, 1913, commissioned to investigate the matter on the ground, who says:

"It was for the small fruit farmer of California fighting for his home and for his American community life against submergence by an Asiatic social and industrial order which forced the anti-alien land bill through the California Legislature. Some of the most beautiful rural districts in the state were in jeopardy.

"Instead, the blame must be laid upon these protesting farmers who refused to stand idly by and see themselves forced out of the homes they had built; off the ranches they had tilled, out of the communities in which their children were being reared.

"In other words, the coming of Japanese into possession or control of the farms of a given community occasions a reduction of white labor employed by approximately 90 per cent—which practically means obliteration.

"The second blighting effect is through social pleasure. There is little use to argue or speculate over whether the two races should dwell together in brotherly affection. The fact is that they will not.

"The Japanese—without meaning any disrespect to the little brown man—does not commend himself to the average American farmer family as a desirable neighbor. He is not overly clean. He is accused of being immoral. It is claimed the Japanese have no marriage ties as we know the institution. Women, if scarce, may be held

pretty much in common. The white farmer's wife does not run in and sit down to gossip with the Japanese farmer's wife, and she does not want the Japanese farmer's wife running in to gossip with her. Their children cannot play together. Jenny Brown cannot go for a buggy ride with Harry Hiralda. The whole idea of social intercourse between the races is absolutely unthinkable. It is not that the white agriculturist cannot compete with the Japanese agriculturist. It is that he will not live beside him."

The Supreme Court of the United States in *Helm v. McCall*,¹⁴ has held that the equality of rights and privileges with citizens of the United States, with respect to security for persons and property, which citizens of Italy are assured by the Italian Treaty, of February 26, 1871,¹⁵ is not infringed by the provisions of N. Y. Consolidated Laws,¹⁶ that only citizens of the United States may be employed in the construction of public works by or for the state or a municipality, and that in such employment citizens of New York State must be given preference.¹⁷

"Are plaintiffs in error any better off under the treaty provision which they invoke in their bill? The treaty with Italy is the one especially applicable, for the aliens employed are subjects of the King of Italy. By that treaty (1871) it is provided:

"The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to, or necessary for trade, upon the same terms as the native of the country, submitting themselves to the laws there established. The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives, on their submitting them-

selves to the condition imposed upon the natives."¹⁸

"There were slight modifications of these provisions in the treaty of 1913, as follows: That 'the citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant security and protection for their persons and property and for their rights * * *'.¹⁹

"Continuing the provision of 1871, the Court of Appeals decided that it does 'not limit the power of the state, as a proprietor, to control the construction of its own works and the distribution of its own moneys.' The conclusion (194) is inevitable, we think, from the principles we have announced. We need not follow counsel in dissertation upon the treaty-making power or the obligations of treaties when made. The present case is concerned with construction, not power, and we have precedents to guide construction. The treaty with Italy was considered in *Patsone v. Pennsylvania*, 232 U. S. 138, 145, 58 L. ed. 539, 544, 34 Sup. Ct. Rep. 281, and a convention with Switzerland (as in the present case), which was supposed to become a part of it. It was held that the law of Pennsylvania, making it unlawful for unnaturalized foreign-born residents to kill game, and to that end making the possession of shotguns and rifles unlawful, did not violate the treaty. Adopting the declaration of the court below, it was said 'that the equality of rights that the treaty assures is equality only in respect of protection and security for persons and property.' And the ruling was given point by a citation of the power of the state over its wild game, which might be preserved for its own citizens. In other words, the ruling was given point by the special power of the state over the subject-matter,—a power which exists in the case at bar, as we have seen.

"From these premises we conclude that the labor law of New York and its threatened enforcement do not violate the Fourteenth Amendment or the rights of plaintiffs in error thereunder, nor under the provisions of the treaty with Italy."

The case of *Crane v. The People of the State of New York*²⁰ was argued and sub-

(14) 239 U. S. 175 (Nov. 1915).

(15) 17 Stat. at L. 845.

(16) Chap. 31, Sec 14.

(17) For other cases see Treatise, I. in Digest Sup. Ct. 1908.

(18) 17 Stat. at L. 846.

(19) 38 Stat. at L. 1670.

(20) *Crane v. The People of the State of New York*, 239 U. S. 195 (Nov. 29, 1915).

mitted with the case of *Heim v. McCall*, cited above. It involved the same criminal feature of § 14 of the labor law of the state, which was the subject of the opinion in the Heim case. The public work was the construction of catch or sewer basins. The defense was the unconstitutionality of the law, and that it was in violation of the treaties of the United States with foreign countries. One of the workmen employed by the defendant was a subject of the King of Italy.

The provisions of the treaty with Italy set out in the Heim case and similar provisions of other treaties, and the treaty between the United States and Italy, signed February 25, 1913,²¹ were received in evidence. The court sustained the New York statute for the same reasons as given in the Heim case.

The Heim and Crane cases just discussed establish the rule that the state of New York, or any other state, has the sovereign right to prohibit aliens from being employed on public works, on the principle that the citizens of the states contribute the funds through taxes levied on real and personal property, and therefore retain the right to prohibit aliens from the benefits arising by being employed on public works of the state, and limit the preference in such employment to the citizens of that state. Much more, therefore, have the citizens who own the lands of the state, thus taxed for public purposes, the sovereign right to deny aliens the right to purchase or lease lands from citizens of the state, limiting not only the benefit of purchasing and leasing the lands of the states to citizens of the United States, but also the social, moral and economic benefits of the community life of the state to its citizens and those of other states.

An additional fundamental principle has been affirmed by the Supreme Court of the United States, in defining the limitations

and scope of the treaty-making power of the President and Senate in sustaining a statute of Pennsylvania prohibiting aliens from killing wild game. In the case of *Patsone v. Commonwealth of Pennsylvania*,²² the court held:

"A resident unnaturalized Italian not trading in firearms cannot claim that his right under the treaty with Italy of February 26, 1871 (17 Stat., at L. 845), art. 2, to carry on trade and to do anything incident to it upon the same terms as the natives of this country, is infringed by Pa. Laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and 'to that end' making it unlawful for any such person to own or be possessed of a shotgun or rifle."

"The equality of rights and privileges with natives of the United States with respect to security for persons or property which citizens of Italy are assured by the Italian Treaty of February 26, 1871, art. 3, is not infringed by the provisions of Pa. Laws 1909, No. 261, p. 466, prohibiting the killing of any wild bird or animal by any such foreign-born person except in defense of person or property, and 'to that end' making it unlawful for any such person to own or be possessed of a shotgun or rifle."

Keeping in mind the statement of conditions under which the California Land Tenure Acts were passed, we direct in particular attention to what the court said at p. 144: "Obviously the question, so stated, is one of local experience, on which this court ought to be very slow to declare that the state legislature was wrong in its facts";²³ and again at pp. 145-146:

"The prohibition of a particular kind of destruction and of acquiring property in instruments intended for that purpose, establishes no inequality in either respect. It is to be remembered that the subject of this whole discussion is wild game, which the state may preserve for (146) its own citizens if it pleases. *Goer v. Connecticut*, 161 U. S. 519, 529, 40 L. ed. 793, 797, 16 Sup. Ct. Rep. 600. We see nothing in the treaty

(22) 232 U. S. 188 (Jan. 1914).

(23) *Adams v. Milwaukee*, 228 U. S. 572.

that purports or attempts to cut off the exercise of their powers over the matter by the states to the full extent. *Compagnie Francaise de Navigation & Vapeur v. State Bd. of Health*, 186 U. S. 380, 394, 385, 46 L. ed. 1209, 1216, 1217, 22 Sup. Ct. Rep. 811."

We have seen in the law of "Escheat" that the state at all times retains an interest in the property, personal and real, of the state.

In the case of wild game it only becomes the property of the citizens of the state when reduced to the possession of the individual who killed or purchased it. Here the Supreme Court holds that the citizens of a state prohibit aliens from killing wild game and limit that benefit to citizens of the state.

For a greater reason, therefore, have the citizens of the state, who together own the entire property of the state, by the legislative authority of the state, the right to prohibit aliens from acquiring the title of, and leases for more than three years, of land situated within the state, especially so as to preserve the social, moral and economical conditions compatible with the civilization being developed with the state and our country.

Chief Justice Waite, in *Munn v. Illinois*,²⁴ in defining "a body politic," quotes from the Preamble of the Constitution of Massachusetts, "A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good." Applying this principle to the foregoing set of facts, it follows that: Just as every citizen has a right to determine what neighbor's children shall exercise the privilege of associating with his own children within his yard, so have all the citizens of the state, through their legislative

body, the right to regulate and control moral, social and economic principles which locally threaten the destruction of their own social and moral fabric of their community life.

To hold that the treaty-making power is vested with the authority to repeal the California Land Tenure Acts is to deny the sovereign authority of the state the right, as defined above, to regulate matters of strictly local, social, moral and economic concern.

Should our Supreme Court sustain such a treaty, it would make precisely the same blunders it made in the Dred Scott decision,²⁵ when it held that though Sanford took Scott and his wife from Missouri, a slave state, into Illinois, a free state, where Scott resided and reared his children for several years, that Scott was still a slave, a chattel. This decision repudiated the presumption of law that there were legally free and slave states, according to the will of the majority of the citizens of the states.

From what precedes, it follows that, as merely a matter of logic, there is no authority vested in the treaty-making power to limit or repeal the right of the states to prohibit aliens from owning lands or leasing same, for agricultural purposes, for more than three years; for in the first place the treaty-power of the President with the concurrence power of the Senate, are powers co-ordinate with the legislative power of Congress, and treaties are no greater legal obligation than acts of Congress. Acts of Congress and treaties made in pursuance of the Constitution under the authority of the United States are both the law of the land, but no paramount authority is given to one over the other, the scope of the one being no greater than that of the other.

Congress has no authority over the administration of estates within the jurisdic-

(24) 94 U. S. 113 (1877).

(25) *Dred Scott v. Sanford*, 60 U. S. 393.

tion of the same to the exclusion of state authorities; no authority over the control of the title of real and personal property of the citizens of the state or the public funds raised therefrom by taxation (beyond raising of funds by taxation for national uses); nor has Congress any authority over the control and regulation of the social, moral and economical conditions of citizens, locally peculiar to individual states and parts thereof.

Therefore, since the scope of the treaty-making power extends no farther than the authority of acts of Congress, there is no authority vested in the treaty-making power to repeal acts of state legislatures, denying aliens the right to purchase and lease lands from citizens of the state.

The scope of authority, with which the diplomatic representatives of foreign countries are clothed, is as a rule vastly broader than that with which the diplomatic representatives and the President of the United States is vested. This is due to the limitations to the exercise of the treaty-power fixed by the limitations in the Constitution of the United States. Therefore, the diplomatic representatives and the President of the United States, in contemplating negotiations, are in duty bound to acquaint diplomatic representatives of foreign countries with these limitations when negotiations begin.

In case the diplomatic representatives of the United States have executed a treaty which contains provisions in contravention of the Constitution of the United States, they are not binding upon the people of the United States. The issue then raised is one between the political departments of the countries interested, to be adjusted peacefully or by war.²⁶

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(26) Gray v. Clinton Bridge, 7 Am. Law Reg. (N. S.) 151; Hammond I, 22 Sec. 54.

BILLS AND NOTES—NEGOTIABILITY.

R. S. HOWARD CO. v. INTERNATIONAL BANK OF ST. LOUIS.

St. Louis Court of Appeals. Missouri. Jan. 8, 1918.

200 S. W. 91.

Notation on back of check, "To be used in part renewal of note," did not destroy its negotiability, but was a statement of the transaction which gave rise to the instrument within Rev. St. 1909, § 9974, providing that such a statement does not render a promise to pay conditional.

ALLEN, J. This is an action to recover, as for money had and received, the proceeds of a check for \$1,398.60, executed by the plaintiff to the order of "Bollman Bros.", and which came into the hands of the defendant bank under circumstances to be stated below. The trial, before the court without a jury, a jury having been waived, resulted in a judgment for defendant, from which plaintiff prosecutes the appeal before us.

The evidence discloses that on February 21, 1913, the Bollman Bros. Piano Company (hereinafter referred to as the Bollman Company), a corporation engaged in business in the city of St. Louis, executed to the plaintiff corporation, a wholesale dealer in New York City, a note for the sum of \$1,656, due June 21, 1913. It appears that these two companies had had business relations for many years prior to the time of the transactions here involved. This note was discounted by plaintiff at a bank in the city of New York, and in due course it was forwarded to a trust company in the city of St. Louis, where, on and prior to June 16, 1913, it was held for collection. On June 14, 1913, plaintiff mailed to the Bollman Company its check for \$1,398.60, being the check in controversy, upon the agreement or understanding between the two companies that the Bollman Company would take up the note held at the trust company, utilizing therefore the proceeds of the check and further funds of its own, and execute another note to plaintiff for \$1,400. This check was in the following form:

"No. 11989. New York City, June 14, 1913.
"The New York County National Bank: Pay to the order of Bollman Bros., to be used in part renewal of note due 6/21, thirteen hundred ninety-eight 60/100 dollars.

"R. S. Howard Company,
"\$1,398.60. R. S. Howard, Pres't. & Treas."

The Bollman Company was then a depositor in defendant bank; and, upon receiving this check, that company, on June 16, 1913, indorsed the same and deposited it to the company's account with the bank, the check being a part of a deposit of \$2,163.95 made by the Bollman Company on that day, consisting of \$100 in cash, 29 small checks, and the check in controversy. The evidence shows that defendant credited the Bollman Company with the total amount of this deposit, against which that company was allowed to draw checks; and that thereafter the check in controversy was duly collected by defendant through the usual banking channels. On the day of that deposit checks of the Bollman Company were paid by defendant, amounting to \$156.05, leaving a balance of \$4,758.29 in that company's account at the close of the business day. On the next day, June 17th, the Bollman Company deposited \$436.50, and defendant paid the company's checks, aggregating \$2,552, leaving a balance of \$2,642.79 in the account. On June 18th, the Bollman Company deposited \$1,968.40, and defendant paid its checks aggregating \$1,345.81, leaving a balance of \$3,265.38 in the account. On June 19th the Bollman Company deposited \$1,500.78, and defendant paid its checks aggregating \$510, leaving a balance of \$4,256.17. On June 20th no deposit was made by the Bollman Company. On that day defendant charged the account with certain checks drawn by the Bollman Company and paid by defendant, and also with the amount of two notes of \$1,500 each, being notes which defendant had previously discounted for the Bollman Company, and which had been forwarded to Chicago, Ill., but which had been dishonored and returned to defendant. On that evening the balance in this account was \$126.33. Shortly thereafter the account was transferred to another bank. The Bollman Company did not carry out its agreement or understanding with plaintiff in regard to effectuating a renewal of the note of \$1,656, due June 21, 1913, and plaintiff was required to take it up from the bank at which plaintiff had discounted it. Soon thereafter the Bollman Company became a bankrupt.

There is testimony for plaintiff to the effect that, subsequent to the transactions to which we have referred above, the president of the defendant bank, in conversation with plaintiff's counsel, admitted that defendant collected the check in controversy and applied the proceeds thereof to the payment of a debt due defendant from the Bollman Company. Further testimony of the witness, however, shows that in this conversation plain-

tiff's counsel was told that the check came into defendant's hands by being deposited in the Bollman Company's account.

The court, having refused certain declarations of law offered by plaintiff, gave six declarations offered by defendant. The first of these is a peremptory declaration that under the law and the evidence plaintiff cannot recover. We may say that other declarations of law given indicate that the court proceeded upon the theory that the notation upon the check, viz. "To be used in part renewal of note due 6/21," did not destroy the negotiability of the instrument, "or put any duty upon defendant to inquire concerning the same," and that defendant became a bona fide holder of the check for value.

The sixth declaration of law is as follows:

"The court declares the law to be that if plaintiff proved up a claim against the bankrupt estate of Bollman Brothers Piano Company, covering the amount here claimed, then plaintiff cannot recover."

We think it obvious that the sixth declaration of law, supra, was unwarranted under the facts of the case, as learned counsel for plaintiff here, contends. It appears that plaintiff did file a claim against the estate of the Bollman Company in bankruptcy based upon the original note, which, as said, was not taken up by that company as contemplated; but it does not appear that plaintiff ever filed a claim against the bankrupt estate covering the item evidenced by this check. Obviously the argument advanced and the authorities cited by learned counsel for respondent in this connection are here without application. Since the original note was never paid, and plaintiff was required to account therefor to its bank in New York, where the paper had been discounted, it was, of course, the basis of a valid claim against the estate of the bankrupt, wholly independent of any claim which plaintiff had, or may now have, against any one, as for a recovery of the proceeds of the check in controversy. By the immediate transaction here involved, plaintiff simply advanced a further sum of \$1,398.60, for which, so far as the record discloses, plaintiff has received nothing.

It remains to be seen, however, whether the evidence warrants a recovery by plaintiff of the proceeds of this check from this defendant. This is the real question before us. If plaintiff made a *prima facie* case, then the trial court not only fell into error in giving this sixth declaration of law, but erred in giving the peremptory instruction or declaration. Good-year Tire & Rubber Co. v. Ward et al. 197

Mo. App. 286, loc. cit. 292, and cases there cited, 195 S. W. 75. On the other hand, if the evidence is not such as to warrant a recovery herein by plaintiff upon any theory, than the judgment below must be affirmed.

The theory of plaintiff's learned counsel, in substance, is that by the notation upon the check, supra, the payee therein named, the Bollman Company, was invested with a limited agency or authority to use the proceeds thereof only for the specific purpose of effectuating a renewal of the note mentioned; that this notation "was notice to the defendant bank that said check was to be used for a special purpose, and of the agency and authority of Bollman Bros. Piano Company," or at least sufficed to put defendant upon inquiry as to the true facts; and that under the circumstances shown in evidence, defendant must be held to have wrongfully appropriated the proceeds of the check to its own use, whereby it became liable to plaintiff therefor as for money had and received.

It would unduly extend and incumber the opinion to discuss the various authorities cited and relied upon by plaintiff. We do not regard them as controlling or persuasive, in view of the particular facts disclosed.

We are of the opinion that the notation upon this check did not destroy its negotiability. It was a statement of the transaction which gave rise to the instrument (Rev. Stat. 1909, § 9974), in that it had reference to the agreement or understanding between the maker and the payee regarding the renewal of the original note. While it constituted a direction as to the manner in which the proceeds were to be applied, we think that the observance of such directions, which related to an act to be done in futuro, was a matter intrusted wholly to the payee, by plaintiff, and which charged defendant with no duty under the circumstances surrounding its acquisition of the instrument. In this connection see Jennings v. Todd, 118 Mo. 296, 24 S. W. 148, 40 Am. St. Rep. 373; Stillwell v. Craig, 58 Mo. 24; Siegel v. Bank, 131 Ill. 569, 23 N. E. 417, 7 L. R. A. 537, 19 Am. St. Rep. 51; Duckett et al v. Bank, 86 Md. 400, 38 Atl. 983, 39 L. R. A. 84, 63 Am. St. Rep. 513.

The check on its face was payable to "Bollman Bros."; and, with that company's indorsement thereon, it was accepted by defendant in the usual course of its banking business as a cash deposit. The taking of the check, so indorsed, by the defendant bank for deposit, the payee being given credit for the amount thereof,

upon which the payee was entitled to immediately draw, operated to vest title to the check in defendant and constituted defendant a purchaser for value. See Ayres v. Bank, 79 Mo. 421, 49 Am. Rep. 235; Bank v. Refrigerating Co., 236 Mo. 407, 139 S. W. 545; Kavanaugh v. Bank, 59 Mo. App. 540. And, as we view the effect of the notation upon the check, defendant became a bona fide holder, or a holder in due course, of the instrument. It is argued that defendant paid nothing for the check, but this view is not tenable under the facts shown by the undisputed evidence.

It follows that the judgment should be affirmed; and it is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

Note.—Reference to Another Agreement as Affecting Negotiability of Note or Check.—The instant case rules in favor of negotiability of the check in question upon the ground that the notation in question merely spoke of an independent promise by payee to do an act *in futuro*, and not as intending in any way to qualify the terms of the check itself. The use of such a check, at most, then would estop the payee from setting up want of consideration of the renewal note referred to by the check.

In Klotz Throwing Co. v. Manfrs. Com'l Co., 179 Fed. 813, 103 C. C. A. 305, 30 L. R. A. (N. S.) 40, Noyes, Cir. J., discussing the negotiability *vel non* of a note which stated upon its face that it was "subject to terms of contract between maker and payee of October 25th, 1905, holding that it was non-negotiable, said that where a provision "constitutes merely a reference to an agreement or a statement of the consideration, it does not impair the negotiability" of a note. And "so if it merely constitutes notice of the existence of the contract and not of the breach thereof, it would not affect negotiability." Then speaking of the note before the court, it was said: "But the evident purpose of the parties to this note was to go further and make it subject to and impress upon it the defenses to which the maker would be entitled under the contract." The opinion cites a number of cases in which the word "subject" to another contract is used.

In Markley v. Covey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698, a provision in a note that it was "given in accordance with the terms of a certain contract under the same date between the same parties," did not impair negotiability, because the unconditional liability was not negatived by such a reference.

In Taylor v. Curry, 106 Mass. 36, 12 Am. Rep. 661, it was held that statement that the note was given "on policy No. 33,386," did not affect negotiability because the reference "may be for mere convenience, or for any other reason, but it cannot be interpreted as a modification of the promise." See also Union Ins. Co. v. Greenleaf, 64 Me. 123. Where a note merely recites the origin of the transaction in which it was given, nego-

tiability is not affected, the effect of the transaction not being set out. P. & B. Windmill Co. v. Honeywell, 7 Kan. App. 645, 53 Pac. 488.

In First Nat. Bank v. Michael, 96 N. C. 53, 1 S. E. 855, the note stated it was given for balance of purchase money for land "sold this day by * * * to me and for which I hold bond for title." It was said: "This reference does not imply a condition or limitation, affecting the promise to pay the sum of money specified; it simply recites the particular consideration and is intended to mark the bond as of a particular transaction between the original parties to it, for their convenience." See also Bank of Sherman v. Apperson, 4 Fed. 25.

These cases seem in full accord with those cited by the opinion in support of its ruling, and we think it cannot be doubted, that the ruling was in strict agreement with an almost overwhelming line of authority.

C.

ITEMS OF PROFESSIONAL INTEREST.

BARON READING ON TECHNICALITIES OF THE LAW.

One of our subscribers has requested us to reprint the following quotation from the address of Baron Reading before the Association of the Bar of New York City, October 14, 1915. Baron Reading, who is now the English Ambassador to the United States, was then Lord Chief Justice of England. That part of his statement which was read with much interest by Americans, was as follows:

"Speaking for myself, I am strongly impressed day by day with the undesirability of the constant reporting of decisions which lay down no new principle, but only report the application of old principles to new facts. I think that I recognize a feeling of satisfaction which the members of the Bar would have in getting rid of their thousands of volumes of decisions so that they might base themselves on the solid principles of the law.

"This system of citing corroborating cases has been changed with us. We now strive to get at the merits; to allow no technicalities to prevent the court from perceiving the true facts and arriving at a just decision, notwithstanding all the learned counsel who appear before the Judge. We believe that is the true principle that should animate the courts of justice."

HUMOR OF THE LAW.

A lawyer has been defined as "the learned man who saves your property from your enemy and keeps it for his trouble," and we are all familiar with that conundrum "Why is a lawyer like a restless sleeper?" The answer to which is "He lies first on one side and then on the other."

A group of visitors was going through the county jail and a burly negro trusty was called to open doors for the visitors.

"How do you like it in here?" one of the women asked.

"Like it, Ma'am? If evuh Ah get out o' heah Ah'll go so fer it'll take \$9 to sen' me a postal card."

The burglar's wife was in the witness box, and the prosecuting counsel was conducting a vigorous cross-examination.

"Madame, are you the wife of this man?"

"Yes."

"How did you come to contract a matrimonial alliance with such a man?"

"Well," said the witness sarcastically, "I was getting old and had to choose between a lawyer and a burglar."

The cross-examination ended there.

In an affidavit filed with the Supreme Court of Michigan a short time ago, excusing delay in perfecting an appeal, the affiant, whose name we omit, makes oath and says that he was delayed from time to time, "by a chapter of accidents," among which he names the following: "Applications of registrants for assistance with Questionnaires; suffering two falls on icy streets causing injuries that became painful and serious, impeding the work for days; then blizzards and coal-famine with wife and daughter in precarious health, compelling constant negotiations for dribs and drabs of coal to make steam heat for a large house, which failed utterly, reducing him to green wood for fuel, which proved inadequate, resulting in serious sickness of his wife, keeping her in bed for weeks and him at home, though with daily hope of resuming work on said papers, frustrated until now—in fact, privations became so imminent as to create an unnerving anxiety;" all of which is good evidence that affiant's excuse should be allowed.

WEEKLY DIGEST

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1. **Attorney and Client—Suspension.**—A member of a firm of attorneys who received a claim for collection, and who, in the absence of his partner, collected it and deposited it to his own credit and checked it out for his personal use, would be suspended for six months.—*State v. Breslin, Okla.*, 169 Pac. 897.

2. **Compensation.**—Where attorneys agreed on a sum certain in a divorce action, and prior to trial returned what had been paid and agreed to take a sum contingent on the amount obtained in a property settlement, such agreement was not alteration of the old contract, but was entered into after a mutual abandonment of the old.—*McFarland v. Hiltsley, S. D.*, 166 N. W. 141.

3. **Bankruptcy—Attorney's Lien.**—Where corporate receiver under order of state court issued certificates, such certificates were not, corporation having been adjudicated involuntary bankrupt, liens preventing allowance out of proceeds of corporate property of reasonable fee to bankrupt's attorney authorized by Bankr. Act.—*Smith v. Shenandoah Valley Nat. Bank of Winchester, Va.*, U. S. C. C. A., 246 Fed. 379.

4. **Conditional Sale.**—Adjudication by referee that seller under conditional sale contract reserving title waived right to reclaim property in possession of bankrupt by accepting guarantee of payment from petitioner held not ad-

judication conclusive against petitioner's claim of reclamation on ground of subrogation.—*In re Aboudara, U. S. D. C.*, 246 Fed. 469.

5. **Conditional Sale.**—Although conditional sale contract provided that sale by buyer would vest title, until such sale was made buyer had legal title subject to seller's mortgage in view of Rev. St. 1911, art. 5654, and such title and none other passed to trustee in bankruptcy under Bankruptcy Act July 1, 1898, § 70, subd. "a."—*Park v. South Bend Chilled Plow Co., Tex.*, 199 S. W. 843.

6. **Contract—Lien on amounts due state employe.**—Lien on amounts due state employe, given by St. 1915, § 3716a, providing for filing judgments against state employes, and for payment thereof in lieu of garnishment, is rendered void by express terms of Bankr. Act, § 677, if the employe is adjudged bankrupt, but the judgment is not affected so that the lien exists upon all sums falling due after adjudication in bankruptcy.—*Jefferson Transfer Co. v. Hull, Wis.*, 166 N. W. 1.

7. **Lien of Materialman.**—Under Ky. St. §§ 2487, 2488, assignee of accounts of bankrupt, who obtained his assignment after materials and supplies had been furnished, cannot defeat lien for supplies and materials on ground that until bankruptcy it was inchoate, for it was expressly declared superior to lien of mortgages or other incumbrances thereafter created.—*Fels v. Geo. Lueders & Co., U. S. C. C. A.*, 246 Fed. 436.

8. **Rescission.**—A seller held, under Bankruptcy Act July 1, 1898, § 47a (2), as amended by Act June 25, 1910, § 8, and in view of Code Ala. 1907, §§ 3386, 3394, entitled, as against the trustee of an Alabama bankrupt, to rescind a sale on account of fraud and reclaim the property.—*Jones v. H. M. Hobble Grocery Co., U. S. C. C. A.*, 246 Fed. 431.

9. **Summary Order.**—Where trustee under deed of trust executed by bankrupt, which had been previously declared invalid, having been directed to deliver to bankrupt trustee property in his charge as trustee, with other creditors, applied for leave to reopen order for payment on theory that decree declaring trust deed was invalid, etc., summary disposition of application was proper.—*In re Dashiell, U. S. C. C. A.*, 246 Fed. 366.

10. **Banks and Banking—Insolvency.**—The term "insolvent," as used in Laws 1909, c. 222, art. 2, § 45, making it a felony for a bank officer to accept deposits when the bank is insolvent, means actual insolvency, and not such constructive insolvency, as is mentioned in the second and third clauses in section 46.—*State v. Syverson, S. D.*, 166 N. W. 157.

11. **Bills and Notes—Burden of Proof.**—In an action on a negotiable note, where defendant pleads and proves that note was procured by fraud, under Rev. Code, § 3516, plaintiff had the burden of affirmatively showing that it was a holder in due course.—*First Nat. Bank of Shenandoah, Iowa, v. Hall, Idaho*, 169 Pac. 936.

12. **Consideration.**—Under Gen. Laws 1909, c. 200, § 22, in action on note, defendant maker could show lack of consideration in that he gave it solely for plaintiff's accommodation, and that it was not intended property in the note

was to be transferred by delivery to plaintiff.—*Lee v. Benjamin*, R. I., 102 Atl. 718.

13.—**Innocent Purchaser.**—Where plaintiff, in acquiring note, did not part with anything of value or change his position, he was not an innocent purchaser, and the note was subject to all defenses available against the original holder.—*Wilson v. Weaver*, Ala., 77 So. 238.

14.—**Note of Defect.**—Where plaintiff bank had actual notice before it acquired notes that sale of stock for which they were given had not brought to corporation any assets as basis for such stock, held it was put upon inquiry as to whether there had been total failure of consideration.—*Commonwealth Bank & Trust Co. of San Antonio v. Limburger*, Tex., 199 S. W. 816.

15. **Cancellation of Instruments**—Negligence.—In cancellation of contract, plaintiff's negligence does not prevent relief, but merely presents a reason for denying it in the exercise of discretion.—*Woldenberg v. Riphan*, Wis., 166 N. W. 21.

16. **Carriers of Goods**—Transportation Charges.—The consignor of freight is liable for transportation charges, unless there is an express agreement between the consignor and carrier exempting the consignor, though the carrier may also look to the consignee.—*Great Northern Ry. Co. v. Hocking Valley Fire Clay Co.*, Wis., 166 N. W. 41.

17. **Carriers of Passengers**—Contributory Negligence.—For a passenger on fast-moving train operated outside of municipality to stand on platform, particularly after warning not to do so, is "contributory negligence" defeating recovery for injuries resulting therefrom, although there is negligence of carrier's employee.—*Louviere v. Southwestern Traction & Power Co.*, La., 77 So. 293.

18.—**Liability for Injury.**—That passenger at railway junction had gotten beyond carrier's premises would not relieve it from liability, if she were still pursuing the way constructed by carrier for her convenience in general use for transfer of passengers between stations.—*Boyle v. Waters*, Mich., 166 N. W. 114.

19.—**Negligence.**—Where through permission of division superintendent, a ticket was sold to plaintiff from a station where passengers were not taken on, the carrier was liable in tort for not stopping its train at that point.—*Fenlon v. Chicago, M. & St. P. Ry.*, Wash., 169 Pac. 863.

20. **Chattel Mortgage**—Notice.—Statement of conditional vendee of automobile to his chattel mortgagee that he had not fully paid for the car, coupled with exhibit of receipt for part payment, did not constitute notice that it was sold under conditional bill of sale.—*Auto Mortgage Co. v. Montigny*, N. Y., 168 N. Y. S. 670.

21. **Constitutional Law**—Classification.—Legislature in enacting criminal laws may take cognizance of the youth of offenders and make provisions modifying or exempting them from punishment, which classification is valid where it operates in a uniform manner upon the class.—*McClaren v. State*, Tex., 199 S. W. 811.

22. **Contracts**—Partnership.—Where partnership acted as manager for insurance company, a partner's payment of a shortage due it, in-

curred through fault of another partner, was not a consideration within Rev. Laws 1910, § 926, to support company's agreement to modify an existing written contract.—*Bowers v. Missouri State Life Ins. Co.*, Okla., 169 Pac. 633.

23.—**Solicitation by Agent.**—Contract whereby plaintiff was to "solicit" for defendant the "general construction work of public and private buildings," for a commission on any contract accepted, was limited to construction work on such public buildings as could be lawfully obtained by solicitation.—*Briody v. De Klinpe*, N. J., 102 Atl. 688.

24. **Contribution** — Consideration. —Where plaintiff gave a note in payment of his subscription for stock in co-operative company, its acceptance of and its action on the subscription, and its application of dividends on the note, though no certificate of stock was issued, furnished a valid consideration.—*Skluzacek v. Fossum*, Minn., 166 N. W. 124.

25. **Corporations**—Assessments on Stock.—A person holding corporate shares in his own name is personally liable for assessments, etc., although stock is actually held in trust for other persons.—*Webster v. Bartlett Estate Co.*, Cal., 169 Pac. 702.

26.—**Assignment.**—Assignment of claim to plaintiff for collection by president of corporate seller according to his custom held valid, although there had been no meeting of board of directors authorizing assignment by president.—*Burrell v. Southern California Canning Co.*, Cal., 169 Pac. 406.

27.—**Bondholders.**—Bondholders under mortgage of a corporation covering after-acquired property who consented to sale of part of property upon condition that proceeds be used in maintaining remaining portion, etc., have lien on such proceeds, including unexpected balance, superior to judgment creditor's lien.—*Clarke Woodward Drug Co. v. Hot Lake Sanitorium Co.*, Ore., 169 Pac. 796.

28.—**Bondholders.**—Provision in trust deed securing corporation bonds, requiring a demand by 25 per cent. in value of the bondholders to move the trustee to action, restricts collection or foreclosure proceedings, but is not a limitation upon the inherent rights of bondholders to protect their interests.—*Hoyt v. E. I. Du Pont de Nemours Powder Co.*, N. J., 102 Atl. 666.

29.—**Insolvency.**—Conveyances by insolvent corporation of its property to another corporation without property, consideration of which fails, and unauthorized conveyances thereof by second corporation to first corporation's mortgagee, held properly annulled at suit of creditors of first corporation.—*Brayton & Lawbaugh v. Monarch Lumber Co.*, Ore., 169 Pac. 528.

30.—**Special Meeting.**—One attacking the validity of a resolution of corporate directors as having been adopted at a special meeting of which insufficient notice was given has the burden of showing affirmatively insufficiency of such notice.—*La Habra Oil Co. v. Francis*, Cal., 169 Pac. 401.

31.—**Stockholder.**—Where stockholders place stock in the treasury of a corporation which is to become theirs again on payment of certain amounts for other stock, and such payments

are made, the issuing of such stock to a purchaser of the interest of one of such stockholders is not without consideration.—*Bates v. Weries*, Mo., 199 S. W. 758.

32. **Customs and Usages—Immemorial Usage.**—To show that flooding at various times is a custom in the husbandry of cranberries, in an action involving the right to dam up waters, it is not necessary that such usage should be immemorial.—*Banks v. Simpkins*, N. J., 102 Atl. 680.

33. **Damages—Anticipation of Injury.**—For expenses incurred by plaintiff in employing watchman for protective purposes, after issuing of temporary injunction restraining picketing, there could be no recovery, in absence of conduct of defendants affording reasonable grounds for belief, suspicion, or fear that past wrongdoings would be continued, notwithstanding injunction.—*Max Ams Mach. Co. v. International Ass'n of Machinists, Bridgeport Lodge, No. 30, Conn.*, 102 Atl. 706.

34. **Evidence.**—In action for injury when struck by jitney bus, evidence of particular nervousness taking form of fear of automobiles was admissible on question of damages.—*Redick v. Peterson*, Wash., 169 Pac. 804.

35. **Measure of.**—The amount paid for use of another auto, while one injured was being repaired, is not the measure of damages for loss of usable value, where it includes gasoline and the entire cost of upkeep.—*Goldshear v. Blank*, N. Y., 168 N. Y. S. 628.

36. **Death—Statute of Limitations.**—Under the Pennsylvania statute, an action by a widow for the wrongful death of her husband is not barred because an action by the decedent for the injury would be barred by limitations.—*Preston v. Western Union Telegraph Co.*, U. S. D. C., 246 Fed. 543.

37. **Ejectment—Joiner of Parties.**—Where persons in possession of separate parts of tracts without common interest are joined in ejectment for whole tract and file separate answers and consent to consolidation of actions, judgment may be rendered against all for possession of entire premises.—*Mullen v. Carter*, Okla., 169 Pac. 867.

38. **Estoppe—Evidence.**—Where automobile owner left car with chauffeur to ship to Cuba, consular invoice exhibited by chauffeur, who sold the automobile, negatived title in the chauffeur, so that delivery thereof to him did not estop the owner to deny the chauffeur's authority to sell.—*Canales v. Earl*, N. Y., 168 N. Y. S. 728.

39. **Executors and Administrators—Collateral Attack.**—One refusing in circuit court to turn over property to an administrator on the ground that an administrator is unnecessary is attempting to collaterally attack a judgment of the probate court directing the administrator to take charge of the estate, which cannot be factually done.—*Meyer v. Nischwitz*, Mo., 199 S. W. 744.

40. **False Pretenses—False Tokens.**—Tablets or checks made in imitation of those used by tradesmen, etc., as evidence of an amount due redeemable in the hands of the holder if used fraudulently to obtain money or property from another, are privy or false tokens within Comp. Laws 1914, § 3819, relating to false pretenses.—*Smith v. State*, Fla., 77 So. 274.

41. **Frauds, Statute of—Memorandum.**—Written memoranda signed by representative of a brokerage firm, members of which as individuals and partners were largely interested in plaintiff corporation, is not binding on defendant corporation, which it was contended through agency of brokerage firm made a sale to plaintiff falling within statute of frauds.—*Woodruff*

Oil & Fertilizer Co. v. Portsmouth Cotton Oil Refining Corp., U. S. C. C. A., 246 Fed. 375.

42. **Warranty.**—Where broker who sold apples pledged his personal responsibility to save plaintiff from loss if plaintiff would pay draft and take apples, which proved decayed, broker's promise was not within the statute of frauds (Rev. St. art. 3965, subd. 2), and could be enforced, though oral.—*Neely v. Dublin Fruit Co.*, Tex., 199 S. W. 827.

43. **Fraudulent Conveyances—Secret Trust.**—Where legal title to land is held by wife on secret trust for husband, it is not subject to levy and sale under execution at law on judgment against husband, but is an equitable asset, reachable only by proper proceedings in equity.—*Guggenheimer & Co. v. Davidson*, Fla., 77 So. 266.

44. **Gifts—Joint Interest.**—The owner of money has created joint interest of himself and another in a deposit when it appears to be his intention to divest himself of the exclusive ownership and control and vest such ownership and control jointly in himself and another, with the attendant right of survivorship.—*Raferty v. Reilly*, R. I., 102 Atl. 711.

45. **Guarantee—Delivery.**—Where guaranty of rent conditioned on its signature by others was delivered to landlord's secretary, who knew of such condition and that it was not to be delivered until such others signed it, his possession of it was not delivery to landlord.—*Columbia Trust Co. v. Crane*, N. Y., 168 N. Y. S. 639.

46. **Highways—Accident.**—An automobile driver who, in broad daylight, drives over a highway made slippery and dangerous by application of tar and oil by county authorities cannot recover from the county for accidents happening to him from such slippery condition.—*Raymond v. Sauk County*, Wis., 166 N. W. 29.

47. **Injunction.**—Where single county commissioner made void agreement that highway should be paved with brick and the other parties sought injunction to prevent paving with other material, which was denied, they were not entitled to damages for the use of the other material; there being no valid contractual duty.—*Tukwila v. King County*, Wash., 169 Pac. 824.

48. **Injunction—Exclusive Rights.**—That express company having by contract exclusive right to solicit business on station platform could recover damages at law did not preclude right to restraining order against others soliciting such business when actual damages could not be ascertained and denial of the injunction would promote multiplicity of suits.—*Thompson's Express & Storage Co. v. Whittemore*, N. J., 102 Atl. 692.

49. **Insane Persons—Next of Kin.**—Persons or kindred bound by law to maintain insane persons supported by commonwealth, within Rev. Laws, c. 87, § 80, are relatives specified in Rev. Laws, c. 81, § 10, providing kindred of any pauper, in line of father, mother, or children, shall be held to support pauper, if of sufficient ability; and that an insane daughter was married, and husband was lawfully bound to support her, could not exempt her father from liability.—*Burrill v. Sermini*, Mass., 118 N. E. 331.

50. **Insurance—Accident.**—Beneficiary of policy insuring against injury effected solely by external, violent, and accidental means, where insured was drowned when steamship was sunk by submarine's torpedo, held entitled to recover, though policy excepted injuries from firearms or explosives.—*Woods v. Standard Acc. Ins. Co. of Detroit*, Mich., Wis., 166 N. W. 20.

51. **Amendment to By-Laws.**—Right of "retiring card member" of barber's benefit union to free reinstatement to full membership under certain conditions, held unaffected by subsequent constitutional amendment fixing maximum age limit less than his own age.—*Stephens v. Noschang*, Mo., 199 S. W. 706.

52. **Application Blank.**—In suit on industrial policy of insurance, the application blank containing signed answers of insured and medical examiner's report although not made a

part of the policy, were admissible.—Brunjes v. Metropolitan Life Ins. Co., N. J., 102 Atl. 693.

53.—Application for.—Where plaintiff made a "John Doe" application for life insurance and defendant instructed him to make formal application in his own name agreeing that the policy would be issued, there was a contract to insure.—Capitol Life Ins. Co. of Denver; Colo., v. Driscoll, Tex., 199 S. W. 872.

54.—Notice of Loss.—Where loss of eye did not result within 20 days after accident, notice of "injury" within policy providing for notice of injury within 20 days after accident, if "reasonably possible," given after 20 days, was in time.—Sheafor v. Standard Acc. Ins. Co., Wis., 166 N. W. 4.

55. **Intoxicating Liquors—Instructions.**—In prosecution for having unlawful possession of intoxicating liquors at a drug store, requested instruction that to convict accused must be found to have been in charge of and not an employee of a store, held improper.—State v. Billingsley, Wash., 169 Pac. 845.

56. **Landlord and Tenant—Estoppel.**—Garage company and persons interested in it were estopped to deny title of plaintiff, who made a lease to one who thereafter organized the corporation and conducted the garage business in its name.—Marlon Street Garage Co. v. Sugden, Mass., 118 N. E. 340.

57. **Libel and Slander—Injury in Business.**—Action for "libel" will lie for a false and unprivileged communication, exposing one to distrust, contempt, or ridicule, or which causes him to be avoided or injures him in his office or employment.—McClellan v. L'Engle, Fla., 77 So. 270.

58.—Words Imparting Crime.—Declaration alleged charging of crime, where specifications stated that language used was, "You burned your buildings," held insufficient in absence of averment of facts and circumstances, which with the uttered words, would convey a charge of crime.—Brown v. Rouillard, Me., 102 Atl. 601.

59. **Malicious Prosecution—Preliminary Hearing.**—Petition, in action for malicious prosecution, alleging that defendant charged plaintiff with felonious assault, and that there was a trial before a justice of the peace, effectually alleged that there was a preliminary hearing.—Becke v. Forsee, Mo., 199 S. W. 734.

60. **Mandamus—Prosecution in Forma Pauperis.**—On mandamus to compel superior court to grant application to prosecute action in forma pauperis, where it appears that since proceeding was commenced the lower court had granted application, petition will be dismissed.—Walt v. Superior Court of Indiana, Ind., 169 Pac. 916.

61. **Master and Servant—Accident.**—Servant's recovery for injuries when nozzle became loosened by disintegration of hose cannot be defeated as matter of law by foreman's testimony that the only thing which could have caused the accident was a loosening of the clamp.—Ruch v. Pryor, Mo., 199 S. W. 750.

62.—Employment.—One hired as sales manager for a year at a monthly salary is not entitled to recover for the time he is bedfast and wholly incapacitated by sickness.—Flournoy v. United Mfg. Co., Mo., 199 S. W. 723.

63.—Evidence.—On issue of damages suffered from picketing, etc., rumors, newspaper reports, and other items indicating and suggesting an intention of defendants to continue to injure the property of plaintiff, and addressing its employees, in violation of injunction, were pure hearsay, and admissible only for the purpose showing the reasons for plaintiff's actions, in safeguarding its property by employment of guards, etc.—Max Ams Mach. Co. v. International Ass'n of Machinists, Bridgeport Lodge, No. 30, Conn., 102 Atl. 706.

64.—Evidence.—In employee's action for injuries from breaking of steering knuckle of automobile truck, evidence as to the breaking of one or other of the steering knuckles on previous occasions held admissible to show notice.—Baldwin Piano Co. v. Allen, Ind., 118 N. E. 305.

65.—Experienced Servant.—Where an experienced miner believed that fuses used in the mine were poor, and knew that the shaft was damp, and had many miss-fires, and that a prior shift had reported miss-fires, he assumes the risk of injury from a miss-fired blast, although the master was negligent in furnishing such fuses.—Peterson v. Otho Development & Power Co., S. D., 166 N. W. 147.

66.—Implied Agreement.—One regularly employed as a stenographer could not recover commission on sale of flour, without showing an employment to make such sale, and an express of implied agreement to pay usual compensation, and that he was procuring cause of sale.—Galwey v. Spindler, N. Y., 168 N. Y. S. 648.

67.—Infancy.—Under federal employers' Liability Act, requiring suits for injuries to be begun within two years after cause of action accrued, infancy is no excuse for failing to bring suit within two years after injury; C. S. 3164, § 4, being inapplicable to actions under such act.—Gillette v. Delaware, L. & W. R. Co., N. J., 102 Atl. 673.

68.—Insurance Fund.—Where telephone company makes all contributions to insurance fund for benefit of employees, and distributes funds according to plan mutually accepted by it and employees, so far as plan is executed in good faith, its terms govern rights of parties.—Clark v. New England Telephone & Telegraph Co., Mass., 118 N. E. 348.

69.—Measure of Damages.—Where deceased paid all his wages intact to his mother as part of a common fund, from which he received his car fare, clothing, and necessary expenses, the full average weekly wage was the proper basis for determining the amount of compensation due the mother without deductions for such expenses.—People's Hardware Co. v. Croke, Ind., 118 N. E. 314.

70.—Respondent Superior.—If watchman was hired to protect property from all destructive forces, in shooting at rat entering premises the watchman was doing master's work, and master was liable for negligent performance.—Green v. Standard Oil Co. of Indiana, Mo., 199 S. W. 746.

71.—Workmen's Compensation Act.—Journeyman paper hanger, hired by foreman of department store's wall paper department, and directed to go to residences of purchasers and hang paper, held employee of store, entitled to compensation under Compensation Act.—In re McAlister, Mass., 118 N. E. 326.

72. **Mines and Minerals—Waiver.**—Payment of stipulated quarterly advances by lessee and acceptance by lessor without demand to drill within reasonable time after termination of quarter within which payments were made operates as waiver of covenant in oil and gas lease to drill within three months.—Johnson v. Armstrong, W. Va., 94 S. E. 753.

73. **Monopolies—Exclusive Rights.**—Railroad station platform being private property, the railroad may for a consideration give express company exclusive right to do an express, baggage, and passenger business on and from the station platform, and such contract does not create a monopoly.—Thompson's Express & Storage Co. v. Whittemore, N. J., 102 Atl. 692.

74. **Municipal Corporation—Contributory Negligence.**—Pedestrian who looked once in direction for vehicles which might make passage over regular street crossing unsafe, and in other necessary directions along street, but who failed to look second time, was not, as matter of law, guilty of contributory negligence.—Redick v. Peterson, Wash., 169 Pac. 804.

75.—Discriminating Ordinance.—Ordinance prohibiting operators of automobiles to cross street intersection at a speed in excess of eight miles an hour, or to do so without giving signal, applying alike to all drivers of automobiles, is not discriminative.—City of Windsor v. Bast, Mo., 199 S. W. 722.

76.—Street Obstruction.—That pedestrian, injured by obstruction within street line was approaching and turning into walk to polling place, did not release city from liability on

theory that holding election is governmental function.—*Lund v. City of Seattle, Wash.*, 169 Pac. 820.

77.—Streets and Sidewalks.—In action for injuries by slipping on sidewalk, witness could say whether at time of trial the dangerous condition continued.—*Hafner v. City of Chester, S. C.*, 94 S. E. 731.

78. Negligence—Burden of Proof.—That defendant was in exclusive possession of first floor of building and that water leaked from that floor into plaintiff's basement show window, did not give plaintiff a cause of action against defendant, without showing negligence of defendant.—*E. Vogel, Inc., v. Mercantile Lunch Co., N. Y.*, 168 N. Y. S. 645.

79. Parties—Joint Duty.—If two carriers maintain a crosswalk between stations at junction, and their neglecting to light the way con-curred to injure a passenger, she could sue both though she alleged no joint duty.—*Boyle v. Waters, Mich.*, 166 N. W. 114.

80. Perpetuities—Rule Against.—A will leaving a business in trust during the single life of his widow, at termination of which business should be sold or continue as a majority of his heirs should decide, is violative of rule against perpetuities as far as continuation of the business is concerned.—*Kempson v. Hoskins, N. J.*, 102 Atl. 678.

81. Principal and Agent—Scope of Agency.—Where one as agent for an automobile sales company sold a car, but had to furnish a new top on account of defects and sent direct to the manufacturer, which exchanged a good top for the bad, such agent suing for deposit was not liable to the sales agency for the price of such new top.—*Lingren v. W. L. Huffman Automobile Co., S. D.*, 166 N. W. 157.

82. Railroads—Contributory Negligence.—A driver is not contributorily negligent as a matter of law in proceeding at a trot across rails, after having stopped, looked, and listened 33 feet from the track, and having reached the conclusion that he could cross safely.—*Wiese v. Chicago Great Western R. Co., Iowa*, 166 N. W. 66.

83.—Right of Way.—Under its charter, providing for right of way 100 feet each side of center of road, where railroad company constructed road without written contract, held that, to obtain such right of way company must show that it entered without written contract.—*Southern Ry. Co. v. Board of Com'rs of Public Works of City of Union, S. C.*, U. S. C. C. A. 246 Fed. 383.

84.—Trespasser.—Pedestrian without knowledge that railway company had made excavation in street held entitled to presume that the sidewalk was reasonably safe.—*Willis v. Kansas City Terminal Ry. Co., Mo.*, 199 S. W. 736.

85. Release—Joint Tortfeasor.—Where plaintiff was paid \$1,700 by street railway in settlement for death of plaintiff's intestate, plaintiff cannot recover in tort for such death against telephone company.—*Clark v. New England Telephone & Telegraph Co., Mass.*, 118 N. E. 348.

86. Sales—Consideration.—Where plaintiff disputed his liability on note given for price of tractor, his payment of note before it was due was sufficient consideration for extension of warranty.—*International Harvester Co. of America v. Haueisen, Ind.*, 118 N. E. 320.

87.—Instructions.—Where plaintiff sold soot blowers on 60 days' trial, and they were never tried, instruction precluding recovery, if they were not up to standard, was error.—*Bayer Steam Soot Blower Co. v. City of Milan, Mo.*, 199 S. W. 712.

88.—Minimizing Loss.—Where defendants, who ordered shoes which had to be manufactured, countermanded their order while the shoes were only in initial state of manufacture, plaintiff, seller, must discontinue manufacture and minimize as far as possible damages for which defendants became liable by countermanding.—*Krohn-Fechheimer Co. v. Palmer, Mo.*, 199 S. W. 763.

89.—Rescission.—The words, "They are all your cattle; I am out of it;" were insufficient to

show an intention to rescind an executory contract to purchase part of a herd of cattle.—*Adams v. Guiraud, Col.*, 169 Pac. 580.

90. Street Railroads—Evidence.—In action against street railway for injuries to boy coasting, evidence that the motorman saw or could have seen the peril of the boy when he could easily have stopped before reaching the point of collision, and that, instead of stopping, he put on more power, held to sustain verdict for plaintiff.—*Saulan v. St. Joseph Ry. Co., Mo.*, 199 S. W. 714.

91. Subrogation—Surety to Contractor.—On account of right of surety of contractor with state to install plumbing to perform on contractor's default, when it did so it was entitled to benefits to contractor under contract, and to be subrogated to all rights of state respecting reserve percentages, all to exclusion of general creditor.—*Derby v. United States Fidelity & Guaranty Co., Ore.*, 169 Pac. 500.

92. Sunday—Ratification.—Where a contract for the sale of real estate expressly stated that it should not be binding until ratified by a certain person and that person ratified it on Sunday, it cannot be enforced.—*County Engineering Co. v. West, N. J.*, 102 Atl. 668.

93. Telegraphs and Telephones—Minimizing Loss.—Allegations that defendant telegraph company erroneously duplicated message to plaintiff's broker for purchase of cotton, causing them to close his account, and that plaintiff when notified of such action could not countermand it because of deranged wire service, etc., do not affirmatively show that plaintiff failed to minimize his losses.—*Pearlstone v. Western Union Telegraph Co., Tex.*, 199 S. W. 860.

94. Trover and Conversion—Evidence.—Where one seizes timber removed from land and is sued in conversion, and he defends on the ground of superior title to land, it is sufficient to show a common source and superior right.—*Chavez v. Schairer, Tex.*, 199 S. W. 892.

95. Vendor and Purchaser—Evidence.—Instrument assigning a purchaser's interest under a contract of sale for a valuable consideration duly signed and acknowledged was a valid contract conveying purchaser's interest, and admissible in action for deposit.—*J. M. Frost & Sons v. Cramer, Tex.*, 199 S. W. 838.

96.—False Representations.—Evidence that one made false representations as to value and conditions of lots without disclosing that he was speaking without knowledge is sufficient under an allegation that representations were made with knowledge of their falsity, since the law supplies the scienter.—*Ulch v. Wessel, Iowa*, 166 N. W. 94.

97. Waters and Water Courses—Liability for Injury.—Defendant, with right to discharge waste water from building into a common drain, did not become liable to plaintiff for damage by such water unless plaintiff's property was injured through defendant's neglect.—*Pearl v. Whitcomb, Mass.*, 118 N. E. 338.

98. Wills—Evidence.—That one receiving \$187,000 by inheritance gave her personal attention to management of her affairs, and increased her fortune by about \$45,000 in 16 years, was strong evidence of her sanity.—*Succession of Miller, La.*, 77 So. 290.

99.—Forfeiture of Rights.—One who applied in Michigan for letters of administration on ground that deceased died intestate, but that there was an instrument in a probate court in California, alleged to be a will, and later objected to jurisdiction of the California court, but alleged such opposition was not a contest or an attempt to contest, did not forfeit her rights under the will, which provided that the rights of any one contesting or attempting to contest should be forfeited.—*In re Hill's Estate, Cal.*, 169 Pac. 371.

100.—Postponed Enjoyment.—Under will creating to life estates with remainder over to specified individuals in words of present devise, title vests in remaindermen upon testator's death with enjoyment of estate postponed until life estates terminate.—*West v. Andrews, Wis.*, 166 N. W. 31.

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ENFORCEMENT OF OBLIGATION AGAINST WIFE VOID UNDER LAW OF DOMICILE, BUT VALID AT PLACE OF CONTRACT.

In *Union Trust Co. v. Grossman*, 38 Sup. Ct. 147, the facts show that a wife with a domicile in Texas, while temporarily in Illinois, executed a continuing guaranty upon notes by her husband and another as makers. The payee knew the circumstances and especially that the wife's domicile was in Texas. The contract was valid under Illinois law, so far at least as to wives there domiciled, but invalid if made in Texas as to wives domiciled in that state. Suit was brought in a federal court in Texas and the Supreme Court affirmed ruling by Circuit Court of Appeals of Fifth Circuit reversing district court, thus declaring that the separate property of the wife could not be made subject to this Illinois contract when sued upon in a federal court sitting in Texas.

The ruling by the Supreme Court puts to one side the question of what should have been held had the suit have been brought in Illinois, saying: "If this suit were brought in Illinois it would present broader issues. On the one side would be decisions that *locus regit actum*, and the consideration that when a woman goes through the form of contracting in an independent state, theoretically that state has the power to hold her to performance, whatever may be the law of her domicile. It might be urged that the contract should be given elsewhere the effect that the law of the place of making might have insured by physical force. * * * On the other hand it is obvious that practically at least no state would take any steps, if it could, before a breach of an undertaking like this. The contract being a continuing one of uncertain duration, the plaintiff had

notice that in case of a breach it might have to resort to the defendant's domicile for a remedy, as it did in fact."

The court also observed that: "In such a case very possibly an Illinois court might decide that a woman could not lay hold of a temporary absence from her domicile to create remedies against her in that domicile that the law there did not allow her to create, and therefore that the contract was void. This has been held concerning a contract made with a more definite view to the disregard of the laws of a neighboring state." See 15 L. R. A. 831, 32 Am. St. Rep. 446.

The view is then expressed that at least the courts of the domicile would not enforce a contract its laws forbade, made by a wife "simply by stepping across a state line long enough to contract."

But all of this appears to predicate refusal to enforce the contract upon an exceedingly narrow ground. If such a contract could have any validity on enforceability anywhere, it ought to have it everywhere. There was the question of capacity by the wife to make such a contract at all, because of the law of her domicile. If this law follows her wherever she may be, the effect upon the principle of contracts valid where made being valid everywhere should be stated. If it constitutes an exception to that principle, the exception should operate, whether the wife be temporarily away from her domicile or for an extended period, no change of domicile being intended.

Furthermore, suppose that suit had been brought on this contract in Illinois and judgment on the contract had been rendered against the wife. That judgment would bind all property there of which she was possessed. If that judgment were afterwards sued on in Texas, would not the faith and credit clause of the constitution override the public policy of Texas and subject all of her property to its payment? If it would, then there would seem only a limited

application of the principle that the courts of a state will not enforce contracts elsewhere made, when opposed to its public policy.

Suppose, again, if he contended, that, so far as real estate is concerned, the principle of enforceability of contracts is qualified by the rule *lex rei sitae*, then still there would remain the question of such judgment being valid as to other interests not in real estate. Would the faith and credit clause give the judgment obtained elsewhere any standing in the jurisdiction whose public policy has become affected adversely? In *Converse v. Hamilton*, 32 Sup. Ct. 415, 74 Cent. L. J. 379, we ascertained the force of the faith and credit clause in making a statutory policy in one state effective in another which recognized an opposing policy. We hardly think this ruling inconsistent with that which respects a general rule, that law of the place of contract governs everywhere, if the Converse case is to govern.

The Supreme Court says: "It is one thing for a court to decline to be an instrument for depriving citizens belonging to the jurisdiction of their property in ways not intended by the law that governs them, another to deny its offices to enforce obligations good by the *lex domicilii* and the *lex loci contractus* against women that the local laws have no duty to protect." But if the duty to protect arises out of faith and credit under a law which is the supreme law of the land, why place importance on the duty of local courts as regards depriving citizens of their rights? If in consequence of the free right of locomotion between states, jurisdiction can be obtained over a citizen away from his domicile, he exposes ultimately his property to loss, is there not a burden on this free right?

Our system of government and the limitations in our federal constitution are ever presenting interesting questions. How far local policy becomes affected by free intercourse between states is an ever-growing

inquiry. No better proof of this may be instances than what may be said to be the gingerly way in which questions involving "broader issues" are referred to in the instant case. One cannot avoid thinking that the law regarding such a question as was involved in the instant case should have been alluded to with a freer hand. It looks like the higher our courts are the more necessity is there for them to tread as if they were walking on eggs. In escaping the dangers of Charybdis they fall into those of Scylla. In the earlier days of our great tribunals the judges expressed their views more boldly and for that reason there is more of *obiter dictum* found in their opinions. And we believe the same is to be said of English opinion, both now and formerly.

NOTES OF IMPORTANT DECISIONS.

WAR—EXISTENCE OF AFFECTING LIABILITY UNDER HOURS OF SERVICE ACT.

—The Hours of Service Act was enacted in 1907. It forbids the placing on duty of any employe of an interstate carrier remaining on duty more than sixteen consecutive hours and placing on duty any employe who has been continuously on duty for sixteen hours shall not be permitted until he has had at least ten consecutive hours off duty. Rests during the continuous service have been held not to break continuity of service, where the rest is so short as not to tend to real recuperation. See 220 U. S. 37, 31 Sup. Ct. 362.

In *Penna. R. Co. v. U. S.*, 246 Fed. 881, in Third Circuit Court of Appeals, there were periods of interruption of continuous service in the running of a freight train regarded as really restful—substantial intermission, where men got rest and relief from mental and physical strain and yet were paid as for continuous service. Men so serving were called on again after a rest of from six to seven hours. A carrier was convicted for not allowing ten hours intermission and the judgment was reversed by the Circuit Court of Appeals.

The appeals court said: "We take this opportunity to say, in these war times, that while it is then, and indeed at all times, the duty of

courts to see to it that laws are neither violated nor relaxed, it is also their like part to see to it that in war times the courts of a country, in their administration of law, recognize the new and unusual conditions which confront them. For, if the administration of the law was so rigid and inflexible as to be self-incapable of adjusting itself to the new conditions governing that to which it relates; then much wrongly charged against the law would be justified. It is now quite apparent that a large number of cases will arise under war conditions which never arose under peace conditions, and which were not and could not have been in view when statutes affecting transportation were passed. These questions, dormant in times of peace, become vitally acute under stress of war conditions and no court can close its eyes to these new conditions."

We do not greatly admire this kind of reasoning. If war conditions might be invoked to justify infractions and the courts allow them to excuse violations of law, we vest in expounders of law an administrative or executive function. We have an executive department and give it discretion. To behold, however, our judicial department running wild could not greatly help in prosecution of the war. In such a time our courts could be better employed in sticking more severely than ever to appointed duty. If the times breed confusion, or have a tendency this way, then we must have our courts to look to with more confidence than ever.

TRIAL—SEPARATION OF MIXED JURIES.
—The Supreme Court of Washington holds that under the law of mixed juries composed of men and women the judicial attitude toward separation of juries while considering a cause should be more liberal than when they were taken from one sex only. *State v. Harris*, 169 Pac. 971.

This case showed that a jury was composed of eleven men and one woman in a trial lasting three days. During intermissions the men went to the regular jury room and the woman to an adjoining room and the door between the two rooms was kept closed. Both rooms were guarded against communication from the outside. It would seem the entire jury was kept together in final deliberation, as objection was confined to the separation during intermissions.

In speaking of the rule allowing separation from necessity, the court said:

"It is our opinion that the separation here complained of can be justified on this ground. The statute making women eligible to jury service of itself necessitated and was of itself a change in the existing system relating to the separation of juries. In trials protracted over considerable periods of time the rules of society, propriety and common decency require that mixed juries be allowed to separate according to sexes at stated intervals during its progress. It may be questioned moreover, whether the courts have not placed a too narrow construction on the word "separate" as used in these statutes. The object and purpose of keeping them sequestered is and has always been, to keep them from being influenced with reference to the matters given them in charge by ulterior practices. This purpose is as well accomplished when the jury are kept singly under the charge of sworn officers of the court as it is when they are kept under like officers in a body."

This is patently true. At all times a jury is to be guarded from outside influence, but it is only when they are deliberating that freedom for interchange of views must be afforded. Were the law to require each one to go to a room by himself to prepare himself for thorough deliberation, this would not be a bad idea. If anything does tend to upset calm deliberation it might be thought that insistence by an impatient juror does. At all events it does not seem a separation of two or more men or women, when they are not allowed to deliberate if they remain together. If it is, then the time a juror sleeps during a recess ought to be deemed a separation. And yet they have been known to do more than nod, when evidence is being submitted or when the judge is charging them or when eloquence of counsel encounters a snore.

The question of mixed juries modifying the old rule may come up when separation takes place at a time when it is the duty of a jury to keep together for deliberative purposes, and not when they are enjoined not to deliberate.

CORPORATION—UNCONSCIONABLE CONTRACT NOT BINDING, THOUGH FREELY MADE.—In *Bassick v. Aetna Explosives Co.*, 246 Fed. 974, decided by District Court, Southern District of New York, it was held that where a commission to a broker was so extortionate on its face as to amount to a gift, it cannot be upheld though ratified by the directors of the promissory corporation.

In this case it appears that there was an agreement by a broker to sell an article in an advancing market for a certain price with his commission to be all over and above the price stated. The broker refused to tell the president what prices were being offered and the president's act in making the contract was ratified by the board of directors. This "overage" commission, as it was called, amounted to about 31 per cent. in a sale amounting to \$5,800,000, or, in round numbers, \$1,800,000.

The court after speaking of the broker refusing to tell the president what price the broker had been informed by private cable the war munitions, the subject of contract, were to sell for, because, as the broker claimed, the contract price had been agreed on and the excess over to belong to the broker and of this being an extraordinary contract, then goes on to say:

"But I go further. In my opinion if it were to be found that the board of directors knew all the facts they had no power to authorize an agreement so disproportionate as to be unconscionable. * * * The courts are holding those dealing with corporations to a constantly increasing responsibility and charging them more frequently with notice, where the subject matter is outside of the ordinary agreements which are necessarily made in the daily conduct of business. Such judicial trend, even in the case of trading corporations, is in response to the need of safeguarding the rights and property of stockholders, often large in number, with small individual holdings, who must rely, not on the fidelity of officers and directors, but also on the rigid application of sensible rules of law developed to meet modern business conditions. * * * It is in the ultimate interest of business and the protection and prosecution of the large enterprises that the investing public must feel confident that a just appeal to the courts will not permit their property to be disposed of under circumstances which amount to a gift, and those dealing with corporations cannot rely, in such event upon the proposition that a board of directors has power, in law, to authorize a gift. Doubtless a natural person, in the absence of fraud or duress, can give away his property; not so with the directors of a corporation as to corporate property."

We doubt very greatly whether the distinction invoked obtains or if it does, that the necessary ingredients to its application would often be present. If, however, there is any market where the wind is not tempered to the shorn lamb, Wall street might be accused, whether that lamb be corporate or individual.

THE DANGERS OF CROSS-EXAMINATION.

Judge C. A. Steeves, of New Brunswick, Canada, has some good advice to lawyers in a recent issue of the *Canadian Law Times* on The Art of Cross-Examination. What the learned judge has to say about the dangers of cross-examination is well worth passing on. He said:

"An experience extending over a good many years has led me to believe that many attorneys who are excellent in the drawing of pleadings, and who are fairly capable in the conduct of the examination in chief, are flat failures when it comes to cross-examination.

"There are various reasons for this. I have seen many lawyers cross-examine a witness, often at considerable length, when there was nothing in the examination in chief which called for a cross-examination at all, and when the cross-examination brought out absolutely nothing for the benefit of the party on whose behalf it purported to be made. These lawyers seem to suppose that their credit is concerned in getting up some kind of a cross-examination, and look upon a witness leaving the stand without it as an opportunity lost, and apparently feeling that their clients would attribute it to a lack of skill or knowledge on their part if the cross-examination did not take place. So they put question after question which does not in any way concern the issue and often does more harm than good. I once heard a very prominent counsel in this province cross-examine a witness at considerable length, and when the examination was over he came directly to me, as I was sitting at the lawyers' table, and said, 'I don't think that examination helped us very much.' I did not think so either and wondered why he conducted it.

"Other lawyers will go over the direct examination, making the witness repeat

what he has already said, in many cases without a particle of variation. This practice simply loads up the minutes, wearies the judge or jury, and has no bearing whatever on the result. Still others think no matter what the circumstances are, the character or reputation of the witness must be attacked, one of the stock tactics of this class of practitioners being to assail the chastity of any witness who chances to be a woman. Not long ago in a case tried before me, a witness was asked regarding a circumstance which had occurred some fifteen years before, and even then was not similar in any respect to the offense for which the defendant was then being tried. Others again will attempt to brow-beat or bully a witness, although I am glad to be able to say this practice is not common among lawyers of standing. All these methods seem to me futile and wrong.

"The rule as to leading questions which obtains in direct examination does not apply to the cross-examination, and if a witness shows a disposition to hide or color the truth, it may be, often is, advisable to be forceful in the asking of questions, although in many instances even of that kind better results are obtained by quieter methods. Anger rouses anger, and it often happens that a witness who is disposed to be friendly to the party conducting the examination is driven to a hostile attitude by the questions asked him, and the manner in which they are put, while a friendly tone will often succeed in obtaining a reply when a surly aspect and harsh manner has entirely failed.

"One of the first things to be considered is whether you will cross-examine at all, and in coming to a conclusion as to this you will first consider whether there is any distinct object to be gained by it. It is necessary to remember that there can be but three objects in cross-examination: To destroy or weaken the force of the evidence the witness has given against you, to bring

out something he has not stated which will tell in your favor, or to discredit him by showing from his past history or his demeanor on the witness stand that he is unworthy of belief.

"Another good rule is not to try to disprove by cross-examination what has not been proven in the examination in chief, thereby supplying a missing link in the chain of evidence. In a case which recently came to my notice, the charge was for selling articles unfit for human food under Section 224 of the Criminal Code. Although it was attempted to be shown by the evidence of the complainant that articles unfit for human food had been sold by the defendant, there was no evidence whatever that the accused had knowledge of this when the goods were sold; yet the attorney for the defendant by a lengthy cross-examination of the complainant with reference to this considerably strengthened the case against his client.

"Josh Billings in his quaint way said many things which contain sound philosophy. One of them is this: 'When you have struck oil stop boring,' and there is no safer rule than this: When you have made your point stop questioning.

"To sum up what I have tried very briefly to say: Cross-examine only with an object; bring out the point and do not cover it. Do not bluster; do not try to dig from the enemy what you should leave alone; rely upon your own testimony. Do not dispute with the court after an adverse ruling; it shows weakness. A good lawyer will be a gentleman and not a boaster of what he can do. He will prove what he can do by doing it. He will not quarrel with the court, but be so ready with proof and law as to convince the court of his claim. He wins who convinces. Many lawyers waste too much time in talking; rely too much on it, tire a court too often by it; go over the evidence until it is threadbare and loses force."

BONUSES FOR CORPORATE OFFICIALS.

Abnormal war profits have developed a new phase of litigation. Corporate officials, working under small salaries, have seen the earnings of their companies rise to prodigious levels. The increases have naturally awakened in the minds of these officials desires for increased compensation. In some instances bonuses have been voted to them and because the amounts, on a percentage basis, or otherwise, have been great, suits have been instituted by minority stockholders to restrain the payment of them, or to compel refunding, if the bonuses have been actually paid. Hence, the law is now very much concerned with the question of bonuses.

A fair syllabus of the whole matter is found in Clark's Work on Corporations third edition:

"A director of a corporation, or an officer of a corporation who is also a director, in the absence of express provision or agreement, is not entitled to compensation for performing the ordinary duties of his office; but he can recover on an implied contract the value of extraordinary services, rendered at the request of the corporation. Where an officer is not a director or stockholder, even in the absence of an express agreement, there is an implied obligation on the corporation to pay for the reasonable value of the services. Express provision is, however, usually made for the compensation of officers. An officer of a corporation cannot fix his own salary."¹

"An officer who is also a director, is not qualified to vote at a meeting of a board on a resolution fixing his salary."²

The New York cases emphasize the point that an officer or director must not influence, by his vote or presence, the fixing

of extra compensation to himself for services rendered. Thus, in the Beers case, it was said:

"That while the tendency of late decisions is to allow a trustee or director to contract with his corporation, provided that while acting for his own interest he does not also act as trustee or director, yet the rule does not apply where one actually presides over a body and superintends a balloting by the result of which he profits individually."

The California case cited, which was decided in 1901, is strong on the point that extraordinary services outside the usual duties of an officer or director, rendered under circumstances not indicating gratuity, merit fair compensation, whether by express or implied agreement.

The Supreme Court of the United States, also, has affirmed a judgment for a general manager of a corporation who was its vice-president and one of its directors, for services rendered "outside his duties as vice-president and director," and where "there was no express contract or authority for compensation," only circumstances raising an implied promise to pay. In the absence of an express contract it was for the jury to say what the intention of the parties was and the fair rate of compensation.³

In New Jersey it has been held that a statute reading in part, "no director shall be entitled to any emolument, unless the same shall have been allowed by the stockholders at a general meeting," does not bar recovery for services outside ordinary duties or for the whole board where all the members cannot act; as agent.⁴

The allowance of compensation for extraordinary services in any instance must conform in all respects to good business.⁵

It is plain then as a general proposition that an officer or director may have extra

(1) § 211, p. 666.

(2) *Id.*, page 668; Cases in footnote, 94; *Beers v. N. Y. Life Ins. Co.*, 68 Hun 75; *Haas v. Universal P. and R. Co.*, 75 Misc. 119; *Bagley v. Carthage, W. & S. H. R. Co.*, 25 App. Div. 475; 165, N. Y. 179; *Bassett v. Fairchild*, 132 Cal. 637, 200 Fed. 266, 52 L. R. A. 611; *Paine v. Kentucky Refining Co.*, 159 Ky. 270, 167 S. W. 375; see note in American & English Annotated Cases, Vol. 1915D 389.

(3) *Corinne Mill & Stock Co. v. Topence*, 152 U. S. 405.

(4) *Chandler v. Mon. Bank*, 13 N. J. L. 265, 30 N. E. 713, 52 L. R. A. 816; 10 Cyc. 901.

(5) *McMullen v. Ritchie*, 64 Fed. 253, 79 Fed. 533.

compensation for services rendered outside his ordinary duties, where he does not procure the contract to be made to himself and he may have it as agent of the whole board where all cannot act, provided always the rate is reasonable.

Now, how far will a court of equity interfere with the matter of extra compensation for an officer or director where the rate has been fixed by express agreement?

It may be observed, *passim*, that a learned federal judge, in a memorandum upon a preliminary hearing for an injunction in a recent case, said that "payment of such large bonuses to the officers of a corporation, paying only moderate dividends to its stockholders, is *prima facie* evidence of misappropriation."⁸

It is difficult to see, however, how a mere comparison between a total of bonuses and a rate of dividends could mean anything. The proportion of bonuses to profits would certainly be significant. This, indeed, seems to be the very point on which the law has not been definitely settled. Much depends, of course, upon the general powers of directors.

On this point:

"Under the law a majority of the stockholders have the control of a corporation and the majority of the directors have power to determine the policy to be pursued and to manage and direct its affairs, and the minority must submit to their judgment so long as the majority act in good faith and within the limitation of the law."⁹

There is, of course, a limit to the discretion of officers and stockholders, controlling a company in the matter of allowances for salaries or bonuses. What this limit is, no court has undertaken to say specifically. All that the law requires is that fraud shall not be practiced on the minority stockholders. Therefore, the question of good faith and good business must

(8) *Shera v. Carbon Steel Co.*, So. Dist. W. Va., 245 Fed. 589.

(7) *Fees v. Mechanics' State Bk.* et al., 84 Kan. 828, 115 Pac. 563, L. R. A. 1915A 606; *Bosworth v. Allen*, 168 N. Y. 157, 55 L. R. A. 750.

depend upon the circumstances of each particular case.¹⁰

That a corporation itself, by its board of directors, could at any time raise the question of ultra vires in an action to compel payment for extra services must be conceded. The question is entirely different where a minority of stockholders are the only complainants. The latter is the phase of litigation which is now engaging the attention of the courts and the public.

It is to be borne in mind that the law favors the acts of directors with strong presumption of regularity, honesty and fairness. A small minority of stockholders, questioning the acts of their directors, come into court generally with bad grace.

"A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such associations to bring suit upon every supposed wrong or injury to the corporation."¹¹

It is established beyond question that negligence of directors which produces no loss is not actionable. Stockholders in such cases cannot complain. In the instance of the payment of bonuses on a percentage basis it is difficult to see how complainants can do more than show that their benefits would have been more had the extras not been paid. This is far from showing a loss. The court cannot say, as a matter of law or of fact that the profits would have existed without the bonuses. They went pari possu.¹²

"12. Equity will not interfere with mere Matters of Corporate Management or Policy.

The true distinction is between acts in excess of the powers of the directors and in breach of their trust, and acts which are within their powers and merely involve an exercise of the discretion committed to them. The rule here is that, in the absence

(8) *Godley v. Crandall & Codley Co.*, 212 N. Y. 121, 105 N. E. 818; note on this case in L. R. A., Vol. 1915 D 632.

(9) *Wallace v. Lincoln Sav. Bank*, 89 Tenn. 630, 15 S. W. 448; and see 7 R. C. L. 308, for numerous other cases.

(10) See note on Liability of Directors to the Corporation, 55 L. R. A. 751.

of usurpation, of fraud or of gross negligence, courts of equity will not interfere at the suit of a dissatisfied minority merely to overrule and control the discretion of the directors on questions of corporate management, policy or business, but will allow the majority to rule, and will leave the dissatisfied minority to redress their grievance through ordinary corporate methods."¹¹

A wide distinction exists, of course, between an action against directors for fraud and negligence and one merely to restrain the payment of unlawful bonuses. In the former, the directors would be personally liable and the damages, if any, would go to the treasury for the benefit of all concerned. In the latter, if the corporation alone is defendant, no recovery of money paid to officers or directors can be had. Further payments may be enjoined, but that is all, unless the officers or directors are joined as separate defendants.¹²

It is noteworthy that none of the cases cited holds or intimates that equity will interfere with the allowance of a salary or extra pay merely on the ground that it is on a commission basis or on account of the large results achieved. Both these elements in themselves tend to show good faith and fair dealing.

"There seems to be no question raised in the books but that an officer of a corporation may be paid a percentage of the profits."¹³

A few of the most flagrant cases of mismanagement with which courts of equity have interfered may now be examined with profit.

(11) *Corporations*, 10 Cyc. 969; see also, 10 Cyc. 829; *Smiley v. The New River Co.*, 72 W. Va. 221.

(12) *Streight v. Junk*, 59 Fed. 323; *Cooper v. Hill*, 94 Fed. 590; see also, 10 Cyc. 966. The form of action to be brought if the officers and directors are to be held separately may be found in *Bosworth v. Allen*, 168 N. Y. 157. Two notes on the "Inherent jurisdiction of equity, independent of statute, at the instance of stockholders, to appoint a receiver or wind up a corporation because of mismanagement or fraud of its officers," are to be found in 39 L. R. A. (N. S.) 1032; L. R. A. 1915A 606.

(13) Numerous cases in note, L. R. A. 1915D 638.

In *Miner v. Belle Isle Ice Co.*,¹⁴ it appeared that officers of a corporation, owners of a majority of its stock, were using it for their own benefit and the injury of the minority stockholders. The court, admitting the general rule that equity will not wind up the affairs of a corporation in the absence of statutory provision, said that:

"When it turns out that the purposes for which the corporation was formed cannot be attained, it is the duty of the company to wind up its affairs; that the ultimate object of every ordinary trading corporation is the pecuniary gain of its stockholders; that it is for this purpose and no other the capital has been advanced; and if circumstances have rendered it impossible to continue to carry out the purpose for which it was formed, with profit to its stockholders, it is the duty of its managing agents to wind up its affairs. To continue the business of the company under such circumstances would involve both an unauthorized exercise of corporate franchise and a breach of the charter contract."

In *Faugeray v. Cord*,¹⁵ which was a case of fraud and mismanagement equally as bad as the Michigan case above mentioned, a receiver was appointed and an order made distributing as a dividend proceeds of sale of certain real estate, part only of the corporate assets. The corporation was not dissolved. The management was not ousted. The court said in part:

"In the case of a wilful breach of trust it (equity) not only compels the guilty trustees to restore the trust property, but removes it from the possession and control of the custodian who has proved untrustworthy."

Under sub-head, "Proof of Mismanagement," in *Ruling Case Law*,¹⁶ it is said:

"What constitutes a proper performance of the duties of a director is a question of fact, to be determined in each case in view of all the circumstances, the character of the corporation, the condition of its business and the usual methods of managing like corporations."

(14) 93 Mich. 97, 17 L. R. A. 412.

(15) 50 N. J. Eq. 185.

(16) 7 R. C. L. 493.

But the law presumes that directors act in good faith and with ordinary care.¹⁷

As the matter of Bonuses has become acute in the Federal Courts and under the laws of West Virginia, it will be well to look at the Federal authorities thus far established and the laws of that state in order to get a fair idea of what the finality will be.

The Federal cases hold that while the management of a corporation will not be interfered with so long as it is fair and honest, excessive salaries or bonuses may be reached and ordered refunded in proper suits at the instance of minority stockholders or enjoined in actions against the company, as to future payments.¹⁸

The West Virginia Code of 1913, Chapter 53 "Of Corporations Generally," makes no provision for fees of officers, nor is there elsewhere in the Code any such provision. Chapter 53, "Joint Stock Companies," Section 2885, provides that boards of directors may appoint officers and agents and executive committees and prescribe their compensation, "but there shall be no compensation for services rendered by the president or any director, as such, unless it is allowed or authorized by the stockholders."¹⁹

It is well to observe that the presence of a director at a meeting of the board fixing extra compensation for his services avoids it in West Virginia as in New York.²⁰

On the whole, it seems that in any state the prudent course would be to have the matter of a bonus fixed by resolution of the

board of directors and ratified by the stockholders of the company.

Because the subject is new and the circumstances pushing it to the front, are confined to certain localities, decisions of courts of different states are necessarily few. An examination of such authorities will show the correctness of the conclusions above drawn, and will serve as a forecast to some extent of what the future of the law will be on this subject.*

WILLIS BRUCE DOWD.

New York, N. Y.

*Where a corporation is controlled by a majority of stockholders who are charged with fraud in its management, the minority may resort to equity for relief. This proposition has been well established in several states: Alabama Red Cedar Co. v. Tennessee Valley Bank, 76 So. 980; Geddes v. Anaconda Copper Mining Co., 245 Fed. (Mon.) 225; Kreitner v. Burgmeyer, 174 App. Div. 48; 162 N. Y. S. 256; Godley v. Crandall & Codley Co., 212 N. Y. 121, 105 N. E. 818; note on this case in L. R. A. Vol. 1915D 632; Forbes v. Wilson, 243 Fed. (Ohio) 264; Kickbush v. Ruggles, 90 So. (S. C.) 163; Moore v. Lewisburg & R. E. Ry. Co., 93 S. E. (W. Va.) 762; Shera v. Carbon Steel Co., 245 Fed. (W. Va.) 589; West Side Irr. Co. v. U. S., 246 Fed. (Wash.) 212.

In some states it has been held that some transactions of directors with themselves are void and, of course, these are incapable of ratification by stockholders. Coleman v. Second Ave. R. R. Co., 38 N. Y. 201; Munson v. Syracuse G. & C. R. R. Co., 103 N. Y. 58, 8 N. E. 355; Billings v. Shaw, 209 N. Y. 265; Politz v. Wabash R. R. Co., 207 N. Y. 113; (but see as to ratification by stockholders, Murray v. Smith, 266 App. Div. 528); Wildberger v. Hartford Fire Ins. Co., 72 Miss. 338, 17 So. 282; Gardner v. Butler, 30 N. J. Eq. (3 Stew.) 702; (but see, contra, Stratton v. Allen, 16 N. J. Eq. (Ice Green) 229; Stewart v. Lehigh Valley R. R. Co., 38 N. J. Law (9 Vroom) 505; Shetter v. Southern Oregon Co., 19 Ore. 192, 24 Pac. 25.

But the trend of authorities is that acts of directors or trustees for their own benefit are only voidable, each transaction standing by itself and to be upheld or condemned according to its merits. In all jurisdictions, stockholders may ratify acts of directors which would have been binding if full lawful authority had been conferred before their inception. Hubbard N. Y. N. E. & W. Inv. Co. 14 Fed. 675; Smith v. Skeary, 47 Conn. 47; Charter Gas Eng. Co. v. Charter, 47 Ill. App. 36; Ward v. Polk, 70 Ind. 306; Bradley v. Martine & River P. M. & M. Co., Fed. Case No. 1789 (3 Fed. Cas. P. 1172); affirmed 106 U. S. 175, 26 L. E. 1034; Main Jellico Mountain Coal Co. v. Lotspeich, 20 S. W. (Ky.) 377; Warren v. Para Rubber Shoe Co., 16 Mass. 97, 44 N. E. 112; Battelle v. Northwestern C. & C. Par. C., 37 Minn. 89; Corder v. Plattsburgh Canning Co., 36 Neb. 548, 54 Nor. 830; Bassett v. Monte Christo G. & S. Min. Co., 15 Nev. 548, 54 Nor. 830; Stewart v. Lehigh Valley R. R. Co., 38 N. J. Law (9 Vroom) 505; Trust Co. v. Weed, 14 Phila. 422; Leavitt v. Oxford & Geneva Silver Mining Co., 3 Utah 266, 1 Pac. 356; Roy & Co. v. Scott Hartley & Co., 11 Wash. 399, 39 Pac. 679; West Side Irr. Co. v. U. S. 246 Fed. (Wash.) 212; Pratt v. Oshkosh Match Co., 89 Wis. 406; Budd v. Walla Walla Printing & Pub. Co., 2 Wash. T. 347, 7 Pac. 897.

(17) 152 U. S. 405.

(18) *In re Knox Auto Co.*, 229 Fed. 241; *Hansen v. Uniform Seamless Wire Co.*, 235 Fed. 616; *Wright v. Warren* (a case from W. Va. to C. C. A.), 204 Fed. 231; *Wight v. Huebleim*, 227 Fed. 667; *Wight v. Huebleim*, 238 Fed. 321; *Robinson v. Carbon Steel Co.* (C. C. A., N. Y.), 228 Fed. 328.

(19) Consult: *Crumlish's Admr. v. Cent. Im. Co.*, 38 W. Va. 390; *Ravenswood S. & G. R. R. Co. v. Woodyard*, 46 W. Va. 558; *Maxon's Admr. v. Maxon Miller Co.*, 53 W. Va. 150; *Clark v. Hendricks Co.*, 56 W. Va. 530. But see: *Watts v. W. Va. So. R. R. Co.*, 48 W. Va. 262.

(20) *Ravenswood* case (*supra*).

CRIMINAL LAW—GOOD CHARACTER.

GREER v. UNITED STATES.

Argued and Submitted Jan. 18, 1918. Decided
Jan. 28, 1918.

38 Sup. Ct. 209.

On a criminal trial, there is no presumption of defendant's good character, since a presumption upon a matter of fact, when not merely a disguise for some other principle, is based on common experience, showing the fact to be so generally true that courts may notice the truth, and it is not common experience that the character of most people indicted by a grand jury is good.

Mr. Justice HOLMES delivered the opinion of the Court.

The petitioner was tried for introducing whiskey from without the State into that part of Oklahoma that formerly was within the Indian Territory. He was convicted and sentenced to fine and imprisonment. Material error at the trial is alleged because the Court refused to instruct the jury that the defendant was presumed to be a person of good character, and that the supposed presumption should be considered as evidence in favor of the accused, with some further amplifications not necessary to be repeated. The court did instruct the jury that the defendant was presumed to be innocent of the charge until his guilt was established beyond a reasonable doubt, and that the presumption followed him throughout the trial until so overcome. The Circuit Court of Appeals sustained the Court below. 240 Fed. 320, 153 C. C. A. 246. This judgment was in accordance with a carefully reasoned earlier decision in the same circuit, Price v. United States, 218 Fed. 149, 132 C. C. A. 1, L. R. A. 1915D, 1070, with an acute statement in United States v. Smith (D. C.) 217 Fed. 839, and with numerous state cases and text books. But as other Circuit Courts of Appeal had taken a different view, Mullen v. United States, 106 Fed. 892, 46 C. C. A. 22; Garst v. United States, 180 Fed. 339, 344, 345, 103 C. C. A. 463, also taken by other cases and text books, it becomes necessary for this court to settle the doubt.

Obviously the character of the defendant was a matter of fact, which, if investigated, might turn out either way. It is not established as matter of law that all persons indicted are men of good character. If it were a fact regarded as necessarily material to the main issues it would be itself issuable, and the Government

would be entitled to put in evidence whether the prisoner did so or not. As the Government cannot put in evidence except to answer evidence introduced by the defense the natural inference is that the prisoner is allowed to try to prove a good character for what it may be worth, but that the choice whether to raise that issue rests with him. The rule that if he prefers not to go into the matter the Government cannot argue from it would be meaningless if there were a presumption in his favor that could be attacked. For failure to put on witnesses, instead of suggesting unfavorable comment, would only show the astuteness of the prisoner's counsel. The meaning must be that character is not an issue in the case unless the prisoner chooses to make it one; otherwise he would be foolish to open the door to contradiction by going into evidence when without it good character would be incontrovertibly presumed. Addison v. People, 193 Ill. 405, 419, 62 N. E. 235.

Our reasoning is confirmed by the fact that the right to introduce evidence of good character seems formerly to have been regarded as a favor to prisoners, McNally, Evidence, 320, which sufficiently implies that good character was not presumed. In reason it should not be. A presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth. Whatever the scope of the presumption that a man is innocent of the specific crime charged, it cannot be said that by common experience the character of most people indicted by a grand jury is good.

It is argued that the Court was bound by the rules of evidence as they stood in 1789. That those rules would not be conclusive is sufficiently shown by Rosen v. United States (January 7, 1918) 38 Sup. Ct. 148. But it is safe to believe that the supposed presumption is of later date, of American origin, and comes from overlooking the distinction between this and the presumption of innocence and from other causes not necessary to detail.

Judgment affirmed.

Mr. Justice McKENNA dissents.

NOTE.—Presumption of Good Character of Defendant in a Criminal Case, as Evidence in His Favor.—Not infrequently courts have declared that there is a presumption that the character of defendant in a criminal case is good. Bennett v. State, 86 Ga. 401, 12 L. R. A. 449, 12 S. E. 806, 22 Am. St. Rep. 465; Mullen v. U. S., 106 Fed. 892, 46 C. C. A. 22.

In the Mullen case there was refused instruction telling the jury that: "The law presumes the

good character of the accused, and such presumption is to be considered as evidence" in his favor. But the Circuit Court of Appeals consisting of Judges Lurton, Day and Severens, in an opinion by Judge Day, said that where no testimony has been offered on the subject of character, the presumption of good character exists. In such case the defendant may "rest upon the presumption raised by the law." "This presumption," said Judge Day, "though less important, is as much his right in a criminal trial as the presumption in favor of his innocence."

Lawson on Presumptive Evidence, 2d Ed., p. 520, said "good character is presumed." But in 1 Whigmore on Ev., § 290, the principle is pointedly denied. With Prof. Whigmore is People v. Lingley, 207 N. Y. 396, 101 N. E. 170, 4 L. R. A. (N. S.) 342, agrees in ruling that if there is no evidence on the subject of character at all, a defendant is not entitled to have an instruction that the law presumes it to be good.

In Peo. v. Pekarz, 185 N. Y. 470, 78 N. E. 294, it was held proper to refuse such an instruction.

Addison v. Peo., 193 Ill. 405, 62 N. E. 235, in approving refusal of such an instruction, said: "If the instruction were the law, a defendant need never prove good reputation, but could take the benefit of proof which perhaps he could not make."

In Knight v. State, 70 Ind. 375, the court said: "In a criminal cause the defendant's character is not taken into consideration unless the defendant first introduces evidence in support of it. In that event the question of character has to be decided in the same manner as any other question in the case."

In McDuffee v. State, 55 Fla. 125, 46 So. 721, it was said: "It would be wholly illogical to say that the defense may, by keeping silent, obtain the benefits that come from good character, and yet by that same silence prevent the prosecution inquiring into it."

In Chambliss v. U. S., 218 Fed. 154, 132 C. C. A. 112, Smith, Cir. J., referred to the Mullen case and to Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. ed. 481, as sustaining the principle that a defendant was entitled to an instruction of presumption of good character, but Judges Hook and Amidon disagreed with him for reasons stated in Price v. U. S., 218 Fed. 149, 132 C. C. A. 1, 46 L. R. A. (N. S.) 1070.

The Coffin case was severely criticised by 4 Wigmore, § 2511, in a note which said that the court relied on Greenleaf, who said this "presumption was evidence in favor of the accused." This apparently was confirmed in Allen v. U. S., 164 U. S. 492, 17 Sup. Ct. 235, 41 L. ed. 528, but later in Agnew v. U. S., 165 U. S. 36, 17 Sup. Ct. 235, 41 L. ed. 624, where was an instruction which embodied the phrase and it was refused. This ruling was sustained because when "legal presumptions are treated as evidence," they have "a tendency to mislead." The later ruling was attributed to a notable lecture by Prof. Thayer at Yale University, in which the Coffin case was claimed to contain a fallacy.

But the Coffin case had its influence in Bryant v. State, 116 Ala. 445, 23 So. 40; Peo. v. Winthrop, 118 Cal. 85, 50 Pac. 390; Emery v. State, 101 Wis. 627, 78 N. W. 145; Bartley v. State, 53 Neb. 310, 73 Neb. 744. It was relied upon in the Mullen case.

It seems to have been repudiated in State v. Soper, 148 Mo. 217, 49 S. W. 1007. And in Peo. v. Ostrander, 110 Mich. 60, 107 N. W. 1079, an instruction on presumption of innocence was held to embrace it.

In the Price case it was said that: "Whenever the question has been directly presented for decision, it has been held, with a single exception (the Mullen case) that unless the defendant puts his character in issue by producing evidence himself, it is wholly outside the case. On the one hand, there is no presumption in regard to his character being good or bad; and on the other hand, neither the court nor counsel can properly refer to defendant's character as an element to be considered by the jury." This case contended that the Coffin case did not really pass upon the question and when it was retried there was omission by the judge of all reference to the proposition, and this action was in no way criticised by the Supreme Court. 162 U. S. 181, 16 Sup. Ct. 943, 40 L. ed. 1109. See also Chamberlayne on Evidence, §§ 1173, 1175c, 1176c.

It is perhaps not unnatural that in instructions courts have not always distinguished between presumption of innocence and presumption of good character, and whatever of doubt may have existed so far as federal courts are concerned, must be regarded as settled by the instant case.

C.

ITEMS OF PROFESSIONAL INTEREST.

LAWYERS AS WARRIORS.

In 86 Cent. Law Journal, page 100, appears an article by Mr. Fred H. Peterson, on "Lawyers as Soldiers." It has aroused wide-spread interest, so that our desk is covered with interesting stories of lawyers who have given up their practice to lead the hosts of liberty against the tyrant of autocracy. Among the most interesting letters is one from Hon. D. A. Valentine, secretary of the State Bar Association of Kansas, inclosing a letter of Judge James W. Finley (now an officer at Camp Funston). Judge Finley was to have written a paper for the last meeting of the Association on "Lawyers and Warriors," but found it impossible to complete his task. The following personal letter to Mr. Valentine is published, with the latter's permission, as a contribution to the general fund of information which we are collecting with respect to these lawyers who have received commissions as officers in the new national army. Judge Finley's letter, date of January 29, 1918, is as follows:

Hon. D. A. Valentine,
Secretary State Bar Association,
Topeka, Kansas.
Friend Del:

About two weeks ago I wrote to Judge Slonecker that I would be unable to be present or to prepare a paper for the State Bar meeting, and suggested that he see you and if possible substitute someone in my place on the program. In reply he informed me that it was too late to alter the program and urging me to prepare my paper and if unable to be present to send the paper in to be read. I regret more than I can tell you that I am unable to do either. At the time I accepted the invitation to prepare a paper on "Lawyers and Warriors" I thought I would have abundant time to do so, as I had not been very hard worked for several weeks prior to that time. About the time I accepted your kind invitation I was relieved of my command of the 9th Company, 184th Depot Brigade and transferred to Company H, 354th Infantry, and since then I have been deluged with work.

As you may know the Depot Brigade is the organization that receives the raw recruits into the army where they are classified and later transferred to the regimental organizations. In the regiments the men receive the instruction necessary to make them fit for duty on the firing line. At the time, and for several weeks preceding the time, I was transferred from the Depot Brigade practically all the men in the Brigade had been delivered to the regiments, so that work in the Depot Brigade was light, and will be until the next draft begins to arrive, while in the regiments everyone is working at the top bent of his capacity.

You will better understand what I have to do if I outline a day's work. The day begins at 6 o'clock in the morning. Reveille is held at 6:25, when all men and officers must be present. Breakfast follows and from 7:00 to 7:45 sick reports and morning reports are prepared and the other details for the day. At 7:45 the regiment is formed and marches to the drill ground, a distance of about three miles, or to the rifle range, a distance of six miles, where drill, maneuvers or target shooting are practiced. At 12:15 p. m., the regiment is returned to the barracks and companies dismissed for dinner. At 1:30 p. m., the regiment is returned to the drill ground for instruction, usually in bayonet work and hand grenade and sometimes drill. At 5:15 p. m., the companies are dismissed for the day, except that three times per week classes are held in the evening

for the instruction of the non-commissioned officers. At 6:30 p. m., all commissioned officers of the regiment are assembled for conference. After conference officers' school is the order of the day until 10:00 o'clock. From 10:00 to 6:00 a. m. one can go to bed if he feels the need of rest, or if his energies have not been sufficiently dissipated he may indulge himself in such pastime as his nature most craves, providing always he does not transgress the bounds of divisional orders. A careful scrutiny of these orders has, so far, disclosed nothing one can do except to go to bed. I have felt some apprehension and alarm at times lest they be made more rigorous, and our leisure entirely abolished.

But perhaps there is method and wisdom in thus "Making the night joint laborer with the day," for I have heard, and I only repeat it here knowing it will receive confidential and sympathetic treatment that when too much leisure is left to the disposal of men in the army an American game, known as poker, which you may remember having heard of, flourishes in all its pristine vigor.

When the weather is too inclement for outdoor work we follow a program of indoor instruction, and this is quite as hard work for the officers as is the outdoor work. It is no easy task for two or three men to lecture 8 hours per day. As you can well understand it takes not a little cramming to get the necessary material for these lectures.

But all this is quite aside from what I would say if I had been permitted to write of "Lawyers and Warriors." I am sure I have held the legal profession in as high esteem as most men. It has been my good fortune to know lawyers from about every angle one can view them, and I have never had any patience with those who have been busy of recent years casting odium on the profession and discredit on the courts. My experience in the army has been abundant justification of my previous convictions. I have been surprised, agreeably surprised, at the attitude of the bar towards this war. Perhaps as a class we have better understood the principles involved that led the country into it, and the grave threat there was to free governments if Germany and her allies were successful in it, than have men of other professions or business. At any rate the legal profession, more than any other, has given over its members to the business of war. The medical profession ranks second. While I have no statistics at hand to verify my belief, I am nevertheless, of the opinion that at least 20

per cent of the officers who have been commissioned in the Officers' Reserve and the National Army from the first and second Officers' Training Camps are lawyers by profession. If the percentage were only half this it would be a most remarkable showing. In my own company there are at the present time eight commissioned officers and three of them are attorneys at law. In my battalion there are four captains and three of them are members of the bar. Out of the 1st Officers' Training Camp I believe 40 per cent of the men who were made captains are lawyers. Most of these men are in the army at a financial sacrifice and all of them at the expense of their personal comfort. If there is any satisfaction in these figures to those who speak contemptuously of the legal profession they are welcome to it. However great the benefits rendered by our profession may be to the country in the actual clash of arms a far greater service will be performed when the war ends. As in every other situation of difficulty and trouble the skill and judgment of lawyers is requisitioned, so preparing the contract and specifications for peace will be, in fine, very largely the work of lawyers.

"When the captains and the kings depart" and peace is here again, the need of the lawyer will be more manifest than ever. To adjust the delicate machinery of business to the conditions that will follow the war will require the nicest judgment and the steadiest of hands. There are bound to be almost revolutionary changes in the social and business structure of every country in the world. It will, perchance, devolve upon the legal professions of these countries to pilot them safely through the intricate difficulties following the war. I hope they can do it so well that all "Warriors" must say

"Othello's occupation's gone."

The legal profession has thus far risen nobly to the occasion. That it will rise to the occasion, whatever it may be, following the war, I make no question. Let the whole world

"Charge us there upon interrogatories,
And we will answer all things faithfully."

I have long ago transgressed on your patience. Pardon me for it. If you will be so kind as to express to the Kansas State Bar Association my regrets, and to the very many friends of mine who will be in attendance, my regards, I shall always be

Gratefully yours,
JAMES W. FINLEY,

HUMOR OF THE LAW.

Young Lady (to army surgeon)—I suppose you will marry after the war, Doctor?

Doctor—No, my dear young lady. After the war I want peace.—Squib.

Casey. It's the iligant time Oi had lasht Saturday. Devil a thing can I remember afferer 4 o'clock.

O'Brien. Thin how d'ye know ye had a good toime?

Casey. Shure, didn't Oi hear th' cop tellin' the joddge about it on Monday mornin'?—Boston Transcript.

If this anecdote comes into mind while engaged in convincing the court that your automobile wouldn't for the world intentionally ignore any speed-limit sign that it could read, forget the anecdote. The suitable time to recite it is after the court has collected your fine and cigar.

While a suit was tried a woman in the case persisted in commenting loudly on each answer given by a witness. The judge repeatedly directed her to keep quiet, but she went on audibly contradicting the witness. Finally the judge said:

"Madam, the court demands that you remain quiet. Unless you do so, you will be held in contempt."

Giving the judge a savage look, the woman turned to her attorney and inquired: "Who is that old guy that's buttin' in all the time?"—St. Louis Star.

Counsel for plaintiff was delivering the peroration of an impassioned address. While thundering forth his eloquence he was leaning for support on the back of a chair in front of him. He was a gentleman of much weight, in more ways than one, while the chair was an ancient one, and gave way under the strain placed upon it, with the result that the barrister fell prone to the floor among the wreck. Quickly regaining his feet, he remarked:

"That proves the strength of my argument." This was met with a gentle ripple of merriment all round, which speedily merged into a roar of laughter when the opposing counsel replied:

"My learned brother's argument may be all that he claims for it, but it fell to the ground." —Philadelphia Ledger.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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1. Arbitration and Award—**Estoppel**.—Where on default in contract for delivery of wheat, both parties appeared before board of directors of exchange, and question of interest was fully argued, but interest was not allowed, held acceptance by buyer of amount allowed estopped him from bringing suit for interest.—Helm v. C. H. Albers Commission Co., Mo., 199 S. W. 1008.

2. Army and Navy—**Enlistment**.—Circulation of pamphlet impugning motives of President and Congress in entering into war, and seeking by unfounded assertions to incite antagonism to war, the natural tendency of which was to deter enlistments, violated Laws 1917, c. 463.—State v. Holm, Minn., 166 N. W. 181.

3. Attachment—**Return**.—Return upon an order of attachment describing land as northeast and northwest quarters of section 22 in township 7, range 38, was not void for uncertainty.—Hodgen v. Roy, Kan., 169 Pac. 1143.

4. Attorney and Client—**Associate Counsel**.—The principle that associate counsel having no contractual relation with the client can have no claim to any part of the fund recovered has no application to a bill of interpleader to determine rights to fees left by the client with the clerk of court, in which case the fund will be awarded according to the agreement for division between the attorneys.—Smith v. Waldrop, Ala., 77 So. 331.

5. Contingent Fee.—A valid covenant in an attorney's contract, for contingent fees, based on a legal consideration, is enforceable, though a separate covenant for some consideration is

void as against public policy.—Allen v. Shepherd, Okla., 169 Pac. 1115.

6. Contingent Fee.—Where contract provided no compensation to attorneys unless they should successfully resist action on county warrants, held that, judgment in lower court having been adverse, attorneys were entitled to no compensation; county supervisors having compromised action despite taking of appeal by the attorneys.—Lamar County v. Tally & Mayson, Miss., 77 So. 299.

7. Evidence.—In attorney's action for work and labor, evidence regarding amount involved in controversy for which charge was made is competent to establish amount of responsibility assumed by plaintiff.—Lang v. Leith, Ala., 77 So. 445.

8. Quantum Meruit.—In attorney's suit against stockholders on quantum meruit for services in receivership proceedings, measure of compensation must be commensurate with labor and talents required for particular litigation.—Valley Oil Company v. Ready, Ark., 199 S. W. 915.

9. Waiver.—Attorney not or record nor hired by plaintiff, but seated at counsel table assisting during trial, held not authorized to waive by silence, other attorneys being absent, plaintiff's objections to instructions given after submitting case to jury.—Lampert v. Aetna Life Ins. Co., Mo., 199 S. W. 1020.

10. Bankruptcy—Assignment for Creditors.—Under Rev. St. Tex. 1911, arts. 1205-1207, dissolution of corporation whereby property was transferred to directors as receivers, held in effect assignment for benefit of creditors, amounting to an act of bankruptcy, within Bankruptcy Act, § 3, subd. a (4), as amended by Act Feb. 5, 1903, c. 487, § 2.—Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., U. S. C. C. A., 246 Fed. 653.

11. Preference.—A creditor receiving an illegal preference is not entitled to have the amount due from the bankrupt set off against such preference.—Rotan Grocery Co. v. West, U. S. C. C. A., 246 Fed. 685.

12. Res Judicata.—Where record only showed that directors of corporation adjudicated bankrupt filed demurrer, held that, corporation not objecting, they could not complain that court on demurrer adjudicated corporation bankrupt, without awarding jury trial as demanded by corporation.—Moody-Hormann-Boelhauwe v. Clinton Wire Cloth Co., U. S. C. C. A., 246 Fed. 653.

13. Banks and Banking—**Forgery**.—In depositor's action against several banks for amount paid on his forged checks, evidence as to depositor's confidence in honesty of agent retained during time forgeries occurred was properly excluded, where pleadings did not raise issue as to negligence in retaining such agent.—National Bank of Commerce v. Fish, Okla., 169 Pac. 1105.

14. Negligence.—A bank that held a draft for 27 days without notifying the payee of non-payment when instructed to give notice by wire was guilty of negligence, and liable for resulting loss.—Terrell v. Commercial Nat. Bank, Tex., 199 S. W. 1133.

15.—**Officer de Jure.**—It is possible for a bank corporation to create the de jure office of assistant cashier, but there need not be such de jure officer in order to have such de facto officer, and one elected by the directors and held out to the public for eight years as assistant cashier is a de facto, if not a de jure, officer of the bank.—*Ex parte State, Ala.*, 77 So. 353.

16. **Beneficial Association—Local Lodge.**—Where charter of local lodge was suspended or revoked without notice, hearing, etc., the minority members, adhering to Supreme Lodge and organizing new organization, were not entitled to lodge property, etc., as against majority members.—*Supreme Lodge of the World, Loyal Order of Moose v. Los Angeles Lodge, No. 386, Loyal Order of Moose, Cal.*, 169 Pac. 1040.

17. **Bills and Notes—Assignment.**—In a suit on a note, the fact that the original payees assigned it by separate writing to the holders who retained the same partnership name as the transferors, does not prevent them from being "holders" of the note within Code 1907, § 5006.—*Davis v. Florey, Ala.*, 77 So. 413.

18.—**Consideration.**—A note freely given in settlement of a claim for damages to the payee's reputation, resulting from a slander, is not without consideration.—*Macke v. Jungles, Neb.*, 166 N. W. 191.

19. **Carriers of Goods—Bill of Lading.**—Where shipping company, knowing Mexican law required delivery to custom house, induced plaintiff to ship lumber with bill of lading with draft attached, agreeing to surrender lumber only on surrender of bill of lading, and delivered lumber to custom house, which delivered it without bill of lading, the company was liable for the loss.—*South Texas Lumber Co. v. Wolverine Line, Tex.*, 199 S. W. 1129.

20.—**Measure of Damages.**—Measure of damages for delay in transportation of valuable machinery, lost profits not being recoverable because of the carrier not having notice, is the rental value.—*Brothers v. Illinois Cent. R. R. Co., Ala.*, 77 So. 423.

21.—**Tariffs.**—In railroad tariff fixing rates to and from stations named, and also providing for the rates to apply to "intermediate stations," the word "intermediate" refers to stations between those named.—*National Elevator Co. v. Chicago M. & St. Paul Ry. Co., U. S. C. C. A.*, 246 Fed. 588.

22. **Carriers of Live Stock—Notice of Claim.**—Provisions of contracts for interstate shipment of livestock, requiring written notice of claim for damages for as condition precedent to right to recover for loss or injury, are valid.—*Bilby v. Atchison, T. & S. F. Ry. Co., Mo.*, 199 S. W. 1004.

23. **Carriers of Passengers—Contributory Negligence.**—Whether it was contributory negligence of plaintiff to place handkerchief containing \$1,500 worth of jewelry on table in defendant railway's dining car and leave it there held jury question.—*Barden v. New York Cent. R. Co., N. Y.*, 168 N. Y. S. 742.

24.—**Maximum Rate.**—Code 1906, § 4055, making it unlawful for railroads to collect more than the regular fare from passengers who

board trains at places where tickets are not offered for sale, was not designed to control the Railroad Commission in fixing maximum rates, and an order making the maximum ticket rate and the maximum train rate each three cents a mile, is not unreasonable and void.—*Illinois Cent. R. Co. v. Mississippi Railroad Commission, Miss.*, 77 So. 314.

25. **Corporations—Gift.**—A gift to a college for erection of a chapel is not void on the ground that the college, being incorporated for educational purposes, cannot own and control a building used for purpose of conducting religious services.—*Lightfoot v. Poindexter, Tex.*, 199 S. W. 1152.

26. **Commerce—Burden.**—Under Ky. St. §§ 4077-4081, franchise tax on foreign corporation operating steamboat line from points in Indiana to points in Kentucky, and having tangible property in Kentucky, held not an unconstitutional burden on interstate commerce.—*Bosworth v. Evansville & Bowling Green Packet Co., Ky.*, 199 S. W. 1059.

27.—**Public Service Commission.**—That a side track will be used for interstate commerce as well as intrastate commerce does not deprive the state Corporation Commission of jurisdiction to compel the construction or extension of the same.—*Washington & Old Dominion Ry. v. F. S. Royster Guano Co., Va.*, 94 S. E. 763.

28.—**Pure Food and Drugs.**—Gen. Code Ohio, § 12725, prohibiting manufacture and sale of condensed milk made from skimmed milk, held not inoperative because condensed milk made from skimmed milk and cocoanut oil was properly labeled under National Pure Food and Drugs Act, and shipped into Ohio in interstate commerce; neither act nor Constitution depriving state of power to protect citizens against deception.—*Hebe Co. v. Calvert, U. S. C. C. A.*, 246 Fed. 711.

29. **Constitutional Law—Due Process of Law.**—State statute authorizing a city to extend its water system into territory served by water company, but not into territory of other company, held not unconstitutional, as denying company equal protection of laws.—*Norfolk County Water Co. v. City of Norfolk, U. S. C. C. A.*, 246 Fed. 650.

30.—**Freedom of Speech.**—Laws 1917, c. 463, making it a criminal offense to deter enlistments in military forces or aid in prosecuting war, does not infringe Const. U. S. Amend. 14, § 1, preserving freedom of speech and press.—*State v. Holm, Minn.*, 166 N. W. 181.

31.—**Sunday Law.**—The Legislature alone can declare how Sunday should be kept, and if the existing statute is unfair or unjust the remedy is by application to the Legislature, and the court must construe or apply the statute according to its meaning.—*Capital Theater Co. v. Commonwealth, Ky.*, 199 S. W. 1076.

32. **Contracts—Cesser of Authority.**—After resignation of treasurer of debtor corporation, who had been applying its funds to payment of obligation due another corporation, of which he was also treasurer, authority of such officer ceased, and with it any authority by him delegated to officer of creditor corporation to make

such application of funds.—*Emerson v. Fisher*, U. S. C. C. A., 246 Fed. 642.

33.—Execution.—That an agent for a railroad company, in executing a contract in its behalf, used another than his official designation, held not to relieve the company from liability thereon, where he was authorized to make it.—*Thraikill v. Crosby-Southplains R. Co.*, U. S. C. C. A., 246 Fed. 687.

34.—Lease.—Where corporation demised all its property under agreement that lessee should make payments to stockholders, stockholders are not lessors, and can assert no rights as such, but corporation itself by suit in its own name may in case of nonpayment recover rents due.—*West End St. Ry. Co. v. Malley*, U. S. C. C. A., 246 Fed. 626.

35. **Corporations—Contract.**—Contract whereby claimant sold merchandise to co-operative company and agreed to look to proceeds of sale of its stock for payment and received proceeds of stock already subscribed for created no claim against corporation, unless breached by it.—In re Blue Earth County Co-op. Co., Minn., 166 N. W. 178.

36. **Damages—Intervening Agency.**—Plaintiff's discharge from his employment being the purpose of defendant's slander, and resulting, and being something which in the usual course of events would probably follow, defendant is liable therefor, notwithstanding the intervening agency of wrongful discharge by employer.—*Max v. Kahn*, N. J., 102 Atl. 737.

37. **Death—Contributory Negligence.**—Where there was no question as to right of son of deceased who was entitled to recover one-half of damages awarded on account of deceased's suffering before death, together with one-half of value of his expectancy, such amounts being subject only to deduction on account of deceased's contributory negligence, award of \$50 was grossly inadequate.—*Huff v. Bear Creek Mill Co.*, Miss., 77 So. 306.

38. **Deed—Undue Influence.**—Fact that grantor or in deed deliberately expressed purpose to prefer her brother to her two sisters, in disposition of her real estate, was not sufficient to invalidate deed in absence of evidence that reason for such act was undue influence.—*Bennett v. Ward*, Mo., 199 S. W. 945.

39. **Depositories—Trust Funds.**—Funds paid by a county into a depository duly contracted with are not funds of the county, and not trust funds, but become the funds of the bank.—*Roberts v. Bank of Batesville*, Miss., 77 So. 318.

40. **Descent and Distribution—Personal Liability.**—Where manager of corporation received rent notes delivered by the lessee, and there was no agreement on his part as to reimbursement in case defendant was deprived of part of property demised, held, that there was no personal liability which could be asserted against the manager's widow, to whom notes descended on his death.—*Dibert v. Durham*, Miss., 77 So. 311.

41. **Divorce—Contempt.**—One by removing children from state in violation of decree of chancery court of state intrusting them to his care placed himself in contempt of court.—*Burns v. Shapley*, Ala., 77 So. 447.

42.—**Jurisdiction.**—In case where husband and wife lived together in certain county for two years, and because of extreme cruelty wife went to another state, where she resided for about 18 months, held court of county mentioned had jurisdiction of divorce suit by wife.—*Andrews v. Andrews*, S. D., 166 N. W. 166.

43. **Easements—Equity.**—Even if, when grantee was given perpetual use of lane on grantor's property, he was also given right to remove gates therein, his remedy, upon grantor's refusal to remove them, was to remove them himself, rather than a bill in equity, unless his attempt was resisted by grantor.—*Thomas v. Vanderslice*, Ala., 77 So. 367.

44. **Electricity—Demurrer.**—As against general demurrer, petition seeking to recover for

death of plaintiff's husband, who stepped on end of a live wire and was electrocuted when he went to warn children playing on defendant's premises, held sufficient, and objections that word "children" did not clearly show that persons referred to were so immature as to be incapable of judgment is unavailing.—*Atlanta & W. P. R. Co. v. Green*, U. S. C. C. A., 246 Fed. 676.

45. **Eminent Domain—Necessary Property.**—Where another company has condemned a necessary part of land included by a water company in its project, proceedings by the latter to condemn the remaining part will be dismissed, where all the property was necessary to its project.—*Ramapo Mountains Water Power & Service Co. v. Seidler*, N. Y., 168 N. Y. S. 737.

46. **Fixtures—Conditional Sale.**—By oral conditional sale contract as to heating plant the status of the property as personal property, with right of removal in seller, was preserved as against prior mortgages of the realty where it was installed.—*Barbour Plumbing, Heating & Electric Co. v. Ewing*, Ala., 77 So. 430.

47. **Fraud—Fraudulent Representation.**—Where an officer of a corporation handled property in which plaintiff had an interest before the corporation was formed to handle such property, and afterwards mortgaged and sold such property in the corporate name, a complaint against such officer personally for fraud in the division of the proceeds does not state a cause of action, where it is not alleged that plaintiff released the corporation, that the corporation was insolvent, or that plaintiff lost any right through fraudulent representation as to the amount of the proceeds.—*Mahon v. Equitable Trust Co. of New York*, N. Y., 168 N. Y. S. 757.

48. **Habeas Corpus—Res Judicata.**—In habeas corpus proceedings, where defendant answers, but prays no affirmative relief, plaintiff's dismissal of petition disposes of the whole case, hence, although the ordinary thereafter heard defendant's evidence, and awarded child's custody to him, such proceedings were a nullity, so that a plea of res judicata in a subsequent habeas corpus proceeding by the same petitioner is not sustainable.—*Brown v. McCarley*, Ga., 94 S. E. 768.

49. **Husband and Wife—Assault.**—Wife's refusal to cook meals, inform husband of telephone calls, etc., though calculated to embitter and exasperate husband, held to furnish no sufficient excuse for his assault on her.—*Johnson v. Johnson*, Ala., 77 So. 335.

50. **Insurance—Burden of Proof.**—In action on accident policy defendant insurer need not prove that plaintiff intentionally maimed himself beyond a reasonable doubt, although such maiming constituted criminal act.—*Lampert v. Aetna Life Ins. Co.*, Mo., 199 S. W. 1020.

51.—**Forfeiture.**—Where insurer by receiving without objection premiums past due led insured to believe he was entitled to reasonable time for payment after maturity, it could not claim forfeiture for failure to pay premiums on date fixed in policy.—*Southern Indemnity Ass'n v. Hoffman*, Ala., 77 So. 424.

52.—**Suicide.**—Where insured's financial condition did not change, and he met his death as result of pistol wound on day when matters had reached crisis, evidence, in action on accident policy excepting liability for suicide, that insured had previously contemplated suicide, is admissible.—*Brawner v. Royal Indemnity Co.*, U. S. C. C. A., 246 Fed. 637.

53.—**Waiver.**—In action on tornado policy, where insurer by answer pleaded compromise settlement and payment of loss, it waived conditions precedent in the policy, and no prejudice resulted from failure to plead performance of such conditions.—*National Union Fire Ins. Co. of Pittsburg, Pa. v. School Dist. No. 60, of Washington County, Ark.*, 199 S. W. 924.

54. **Interest—Partial Payment.**—In case of partial payments the interest rule requires application of a payment, if it exceeds accrued interest, first to discharge thereof, and then to a

reduction of principal, and if it is less than accrued interest the former principal continues as basis of computing interest.—Porten v. Peterson, Minn., 166 N. W. 183.

55. **Intoxicating Liquors—Local Option.**—Laws 1915, p. 353, § 8, subd. 40 requiring second-class cities to pay counties same part of dramshop licenses as other cities in county pay, is inoperative as to city collecting such license fees, where no other city in county collects such taxes nor can fees collected by such other cities before adopting local option be used as standard.—State ex rel. Green County v. Gideon, Mo., 199 S. W. 948.

56. **Landlord and Tenant—Evidence.**—In an action for rent, evidence that plaintiff's agent would not rent defendant a whole building unless a prostitute on an upper floor was taken care of, was admissible as tending to show notice to plaintiff of the purposes for which the premises were being rented.—Gillespy v. Little, Ala., 77 So. 427.

57. **Libel and Slander—Evidence.**—In an action against a newspaper for libel, in which the truth and fairness of an account of a proceeding in court was not assailed, but only the fairness of comment and criticism, it was proper to inquire into the circumstances surrounding plaintiff.—Light Pub. Co. v. Huntress, Tex., 199 S. W. 1168.

58. **Slander per se.**—Language, if used attributing to another an uncontrollable sexual desire that caused her to commit an unmannerly and unwomanly act, is slanderous.—Macke v. Jungles, Neb., 166 N. W. 191.

59. **Pleading.**—Declaration for libel, consisting of communication to Department of Commerce, from which plaintiff had license, that plaintiff had been so intoxicated that he could not make certain trip, held to state cause of action.—Powell v. American Towing & Lighterage Co., Md., 102 Atl. 747.

60. **Livery Stable and Garage Keepers—Principal and Agent.**—Where defendant motor company's night watchman, who had no authority to hire cars for it or employ chauffeurs, let out car of another which was stored in defendant's garage and employed a chauffeur for owner, defendant was not liable for death of hirer due to negligence of chauffeur or defective condition of car.—Spradlin v. Wright Motorcar Co., Ky., 199 S. W. 1087.

61. **Mandamus—Discretion.**—Mandamus will not lie, except to compel a public officer's discharge of a duty clearly imposed upon him by law, and will not lie to control a discretion reposed in such officer.—Boyle v. Hugo, N. Y. 168 N. Y. S. 789.

62. **Master and Servant—Employers' Liability Act.**—A track 300 feet to 400 feet long, made with steel rails 20 to 25 feet apart, used exclusively for moving a "coke pusher machine," mounted on wheels operated by electric motor and used for leveling, from oven to oven, is not a "railway," or "any part of the track of a railway," under Employers' Liability Act (Code 1907, § 3910, subd. 5), since it is neither used nor intended to be used for the transportation of products, freight, or passengers.—Woodward Iron Co. v. Hubbard, Ala., 77 So. 400.

63. **Employment.**—Where resident of North Dakota entered into contract in Minnesota with Minnesota corporation having place of business therein, to solicit business in both states, and was injured in course of his employment in North Dakota, Minnesota Compensation Act applies.—State v. District Court, Hennepin County, Minn., 166 N. W. 185.

64. **Instructions.**—An instruction telling the jury that if they found that a saw was so placed that it was dangerous to plaintiff while working, as employed sawyer thereabout, or that at the time and prior to plaintiff's injury, if any, it was possible for defendant to have safely guarded said saw, but that defendant failed and neglected to thus guard it, etc., is sufficient, and once to tell the jury that it must be so guarded as not to interfere with its opera-

tion was not necessary; the word "possible" as used, putting that issue before the jury.—Henderson v. Heman Const. Co., Mo., 199 S. W. 1045.

65. **Wrongful Discharge.**—While a superintendent is not so strictly accountable for his time as a clerk or laborer, his voluntary absence from duty without reasonable necessity when his presence is necessary to the employer's business is ground for his discharge.—Farmer v. First Trust Co., U. S. C. C. A., 246 Fed. 671.

66. **Mines and Minerals—Contract.**—Where oil producer gave a pipe owner a bond for \$100,000, entitling producer to proportion of price of oil delivered to pipe owner and to protect pipe owner against adverse claims against producer, fact that such claims existed after payment of \$90,000 afforded no ground for refusal to pay balance due on bond.—Atlas Oil Co. v. Standard Oil Co., Ala., 77 So. 471.

67. **Municipal Corporations—Contributory Negligence.**—Traveler who went upon unusually smooth concrete sidewalk which was sloping at angle, so that many slipped, cannot, where there was nothing in its nature to particularly indicate danger, be deemed guilty of contributory negligence.—City of Lebanon v. Graves, Ky., 199 S. W. 1064.

68. **Negligence.**—In an action against a city and its contractor for injury from falling into an open sewer trench, near a cross-walk, held that the defendant's negligence was for the jury.—Williams v. Arthur A. Dobson Co., Minn., 166 N. W. 189.

69. **Negligence—Rescue.**—Landowner, who leaves on his premises which are frequented by children, an unguarded dangerous agency, is liable to a third person who, without negligence on his part, is injured in an attempt to rescue child or children in peril.—Atlanta & W. P. R. Co. v. Green, U. S. C. C. A., 246 Fed. 676.

70. **Partnership—Profits.**—Where N. was to have one half interest in partnership deal, and S. Bros. the other half, and an interest in the profits, subsequently given a third party, was purchased by N. with firm assets, S. Bros. held entitled to one-half of profits, but not to one-half of such third party's interest in addition thereto.—Smith v. Newhouse, Mo., 199 S. W. 938.

71. **Ratification.**—Partner's ratification of note, containing waiver of exemptions and provision for attorney's fees, could not rest upon constructive knowledge or on imputation of knowledge from mere notice.—Parnell v. Farmers' Bank & Trust Co., Ala., 77 So. 442.

72. **Successorship.**—Under a sale by one partner to the other of the retiring partner's interest, the continuing partner could not recover payments made because of the retiring partner's failure to make the transfer by a technical assignment or writing where the continuing partner assumed full control of the partnership assets.—Rupe v. Kemp, Wash., 169 Pac. 855.

73. **Railroads—Crossing Accident.**—That one driving cattle over a private right of way negligently failed to discover approaching train was no defense to action for damages to cattle killed because of defendant's neglect to maintain proper gate in the right of way fence, where earlier discovery of train would not have prevented accident.—Scullwald v. Union Pac. R. Co., Neb. 166 N. W. 190.

74. **Spur Tracks.**—A railroad cannot refuse to extend a spur track because the person desiring the spur will ship products from another state, his competitors shipping from interstate points, resulting in a decrease in revenue on account of more inequitable interstate rates.—Washington & Old Dominion Ry. v. F. F. S. Royster Guano Co., Va., 94 S. E. 763.

75. **Sales—Breach.**—Where plaintiff agreed to buy pipe for cash, and some pipe was delivered, but cash was not paid, and defendant failed to deliver the remainder of the pipe, but never stated that payment must be made within a certain time, or the contract would be rescinded, defendant could not assert a breach by plaintiff.—Pipe & Contractor's Supply Co. v. Mason & Hauger Co., N. Y., 168 N. Y. S. 740.

76.—Damages.—Where evidence showed that horses were worth at least \$20 a head more than contract price, seller could not recover any substantial damages for failure of defendants to receive and pay for horses according to contract.—*Love v. St. Joseph Stock Yards Co.*, Utah, 169 Pac. 951.

77.—Notice of Delivery.—Where exporter contracted for lumber with mill to be loaded on vessel chartered for purpose, within 60 days, seller knowing time required for furnishing vessel was from 15 to 30 days, it was seller's duty to have notified buyer of estimated time at which it would be ready to deliver.—*McGowin Lumber & Export Co. v. Camp Lumber Co.*, Ala., 77 So. 433.

78.—Passing Title.—Where in consideration for advances defendant was privileged to use cotton delivered to it and to make final settlement with plaintiff upon demand, the amount to be determined by the market price at the time of the demand, there was a sale and the title passed.—*Knight v. Harris, Cortner & Co.*, Ala., 77 So. 440.

79.—Time of Essence.—Time is of essence of unconditional contract to sell and deliver merchandise to merchant by merchant at stipulated price and at fixed time and place.—*McGowin Lumber & Export Co. v. Camp Lumber Co.*, Ala., 77 So. 433.

80.—Undisclosed Principal.—Where one authorized to sell plaintiff's personality negotiated sale and delivered property, but repudiated transaction upon learning that prospective purchasers were acting for undisclosed principals who desired to make payment by setting off debt due them from plaintiff's agent, there was no completed sale preventing plaintiff from suing for conversion of personality.—*Hudson & Thompson v. Barrett*, Ala., 77 So. 428.

81.—Warranty.—To warrant cow sound does not of itself imply she will give milk.—*Roddam v. Brown*, Ala., 77 So. 403.

82. Specific Performance—Nonsuit.—In an action against administrator of a widow alleged to have been sole heir of her deceased husband, and against her heirs for specific performance of parol contract entered into by deceased husband, held that a nonsuit was properly granted.—*Potts v. Mathis*, Ga., 94 S. E. 767.

83.—Oral Contract.—Essential to specifically enforce an oral contract for the sale of land that valuable improvements be made on the land, although the price has been paid and possession taken, and the value of the land cannot be recovered, but the price paid.—*Wells v. Foreman*, Tex., 199 S. W. 1174.

84.—Vendor and Purchaser.—Where a vendor repudiated a contract, and claimed that purchaser in possession had no interest, and purchaser sued for specific performance in which purchaser failed, court should enter judgment determining equitable rights of vendor and purchaser, and adjudicate purchaser's equitable title resting upon vendor's legal title.—*Porten v. Peterson*, Minn., 166 N. W. 183.

85. Statutes—Alteration of.—Though change in language of revised statute does not necessarily alter law, nevertheless, where change is made which is clear, and does in fact modify statute in point of substance, presumption, if any, that no change was intended, must yield to facts.—*In re Peterson's Will*, Iowa, 166 N. W. 168.

86. Street Railroads—Collision.—One who speculates on the question of time of getting across a street car track with an automobile in front of a street car cannot recover damages occasioned by a collision.—*Gean v. Ogden, L. & I. Ry. Co.*, Utah, 169 Pac. 949.

87. Sunday—Profit on Amusement.—The inhibition of Ky. St. § 1321, applies whether the work forbidden to be done on Sunday is for profit or amusement, but the fact that a moving picture theater was run for profit aggravated rather than diminished the offense.—*Capitol Theater Co. v. Commonwealth*, Ky., 199 S. W. 1076.

88. Taxation—Burden of Proof.—The presumption that public officers perform their duties does not dispense with proof that prop-

erty was assessed in name of persons to whom the auditor directed the expiration notice.—*Deaver v. Napier*, Minn., 166 N. W. 187.

89.—Tax Sale.—Where there is a legal bidder at a tax sale, collector must convey to him, and sale to state is void.—*Thibodeaux v. Havens*, Miss., 77 So. 313.

90. Telegraphs and Telephones—Facilities.—Under Public Service Act, § 93, subd. 3, unincorporated telephone company operating small system for private use cannot demand connection with larger company on ground of public necessity or convenience.—*State ex rel. Buttum Telephone Co. v. Public Service Commission*, Mo., 199 S. W. 962.

91.—Punitive Damages.—Where failure to deliver telegraph message promptly prevented mother from seeing son's body or arranging burial, invasion of intangible rights as result of willful wrong in failing to deliver message warranted recovery of damages for mental suffering, though issue of punitive damages was not submitted.—*Western Union Telegraph Co. v. Teague*, Miss., 77 So. 302.

92.—Refusal to Pay Charges.—Plaintiff's expectation of realizing premium of five or ten cents on Columbian half dollar did not justify his refusal to pay exact charge for sending telegram, which he could have made by use of the half dollar.—*Dale v. Western Union Telegraph Co.*, N. Y., 168 N. Y. S. 783.

93. Trover and Conversion—Pleading.—Where household goods kept for use and not for sale, have been wrongfully converted, it is not necessary to allege that such goods have no market value as a condition to right to introduce proof of actual value.—*Kimball v. Betts*, Wash., 169 Pac. 849.

94. Trusts—Reversion.—Deed conveying land to one in trust for separate use of his wife for life, with reversion to trustee or "her heirs" empowering wife to authorize trustee in writing to sell estate and reinvest proceeds, authorized trustee, when so empowered, to convey land in fee simple, though there were minor children living.—*Bibb County v. Jones*, Ga., 94 S. E. 765.

95.—Settlor.—"Then," as used by settlor in phrase of deed of trust, "if he had then died intestate," held to refer to time of settlor's death, being used to fix time for ascertainment of beneficiaries.—*Hall v. Farmer*, Mass., 113 N. E. 351.

96.—Tenancy by Entireties.—On issue whether wife's causing deed of property purchased by her to run to herself and husband as tenants by entireties raised resulting trust against her husband on her death, her statement that she wanted her husband to have "her" property after her death did not show a trust was intended.—*Haguewood v. Brittain*, Mo., 199 S. W. 950.

97. Vendor and Purchaser—Executory Contract.—Vendor by executory contract to convey on full payment, who lets vendee into possession on part payment, has optional remedy on nonpayment of remainder to sue for specific performance, to bring action to recover land, or, under Laws 1913, c. 138, to foreclose vendee's rights under the contract.—*Sweet v. Purinton*, S. D., 166 N. W. 161.

98.—Installments.—Where a purchaser was in possession of land under contract, and certain installments of purchase money were not due, the vendor could not be required to take them in advance of the due date and call in the legal title.—*Porten v. Peterson*, Minn., 166 N. W. 188.

99. Wills—Divise.—Under a will devising property to a husband for life and over for sale and division among testatrix's brothers' and sisters' children and three others equally, the last three took equally with each of the nephews and nieces per capita.—*Nell v. Stewart*, Kan., 169 Pac. 1138.

100. Jurisdiction.—Under a will merely giving the trustee power of sale with the concurrence of the first life beneficiary, the trustee has no such power after the death of such beneficiary.—*Combs' Guardian v. Swigert's Ex'r*, Ky., 200 S. W. 38.

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RIGHT OF PARENT TO RECOVER FOR DEATH OF CHILD EMPLOYED WITHOUT FORMER'S CONSENT.

In Kirkpatrick v. Ferguson-Palmer Co., 77 So. 803, decided by Supreme Court of Mississippi, it was held that, where a minor child was without the consent of his surviving parent in the employ of a lumber company and the child by his contributory negligence was instantly killed by a falling tree, there was no right of recovery by the parent against the company, this ruling being by a majority of three to two members of the court.

It is interesting to notice the prevailing and dissenting opinions in this case, and to compare the general theory upon which the two opinions proceed, the dissenting opinion being especially elaborate.

It was contended for plaintiff that the parent's right of recovery was that the employment at a dangerous undertaking, was without her consent and did not depend upon the statute giving to the minor's relatives a right of action for his death, but it rested upon violation of parental right to the child's services, which right was wrongly interfered with.

The defendant contended that at common law no action would lie for the death of a human being, especially where the death was instantaneous; "that the right to maintain an action under the (Mississippi) statute depends upon a real wrongful or negligent act and that the true test is whether the person killed could have maintained an action * * * if death had not resulted."

The prevailing opinion appears, however, to recognize that some differentiation must be made between cases of minors employed with and without parental consent and holds that the effect of employment without consent is to make the employer liable

"for any injury as the result of being placed at such (dangerous) work."

This opinion also says that: "Conceding that the wrongful employment in the present case was an actionable wrong, the measure of damages under the common law could be no greater than would be the measure of damages if appellee were guilty of the wrongful or negligent killing of the boy. In other words, without our statute, recovery would be limited to services lost during the minority and prior to the death of the child."

In this case as the death was instantaneous there would be no right of action, without the statute. The dissent combats very vigorously this proposition.

The really interesting question in the case was whether at common law any right of action survived to a parent because of death of his child wrongfully caused by another. The general rule at common law that no right of action lay for the death of a human being so far as right of inheritance is concerned, there is no obstacle in applying, because the right of inheritance itself contemplates the ensuing of death.

But suppose there is an independent right in the continuation of a life. Why should not any wrongful interference with that right be good basis for an action. Thus a child is entitled to support by parent and a parent is entitled to services of a child, each right, we will say, being determined by the child's passing his minority.

The dissent cites authority to show, that at common law a master may sue for enticing away his servant and recover according to the time of service remaining unexpired. And if a child is put at dangerous employment without the parent's consent and is injured, there may be recovery for loss of service.

But, if the right to recover is taken away by reason of a wrongdoer causing death, and not merely injury, then there is presented an anomaly in law as well as in logic. The wrongdoer is made liable for what may be a slight wrong and excused if

the wrong is more grave. Is it too broad an application of the common law rule, to say that there being no right to recover for a human life, this precludes all right to recover for the destruction of one's interest in a human life?

Take for example the interest a master has in the services of his apprentice. We know that apprenticeship is encouraged. An apprentice is taken up to be trained to perform certain acts and up to a certain time will be more an expense than a benefit to his master. Just at the time he promises to be of benefit to his master, he is killed by the wrongful act of another. Why should the general principle of no right to recover for the loss of life of another cut off the master's right to action, especially if the master may recover if the apprentice merely is injured?

So take a child, who has been taken care of when of tender years. Why should not his father recover for his death wrongfully caused, when he is approaching manhood?

We may conceive that there might be a distinction as to recovering for expenditure in a child's education up to the time one has lost his child, but what his services up to the time he would have attained his majority would be deemed to be worth might be different.

There is room for the rule that one may not recover for the death of another, unless a statute otherwise prescribes, without making it embrace a special interest in another's life. In the latter case you do not seek a benefit from another's death, but you do seek reimbursement for a loss, that by contract or by relation equivalent to contract has been created.

In the case we are noticing the dissent says that the surviving parent's right and those of the next of kin "depend upon different principles and entirely separate rights." At the same time, if there be a statute giving to a surviving parent a right of action for the death of his child wrongfully caused by another, the statute ought to

be deemed to express the full measure of a wrongdoer's liability therefor. And the question of the right of a parent to recover for the death of a child does not present itself so clearly as were a master suing for the death of an apprentice, in whose life no statute gave him any right.

The common law rule of no one having an actionable right in another's life, at least when a tort is so severe as to extinguish that life, does not wholly satisfy the inquiry presented. When a child is injured two rights of action arise, one by a parent and another by the child himself. Why should death of the child destroy the action by the parent? It is only because a statute for its death is to be construed as covering the entire damage. Where an apprentice is killed and no statute provides for a master's recovery therefor, the death of the apprentice should not defeat all interest of the master in the contractual right which has been affected.

NOTES OF IMPORTANT DECISIONS.

HABEAS CORPUS—SUMMARY ACTION IN DETENTION OF ALIEN ENEMIES.—*Ex parte Gruber*, 247 Fed. — decided by District Court, Northern Division, Middle District of Alabama, holds that the writ of habeas corpus does not lie in favor of an alien enemy restrained of his liberty by the President under the provisions of Presidential Proclamation authorized by Congress to enforce alienage act after declaration of war.

The court so holds in a case where there was no dispute as to applicant for writ of habeas being an alien as described in the law and the proclamation, but his claim was that he was not about to violate any rule or regulation promulgated by the president in his proclamation, and impliedly, he concedes that were he about so to do, he would make himself liable to restraint. Neither does he claim that he was not given reasonable opportunity to show any facts that would take him out of the scope of the proclamation. He sought merely by his petition seemingly for the first time to raise an issue of fact as to whether he was a person liable to be restrained or interned.

It seems clear that had he sought and been afforded opportunity to show he was subject to be interned and doing so the fact was found against him, it is to be said it is well established law, he could not in habeas corpus open inquiry into the finding.

The principle governing findings by an officer or special tribunal are *prima facie* correct and cannot be reviewed in a hearing on habeas corpus. *Ex parte Pupliese*, 209 Fed. 720.

But this is not saying that habeas corpus will not lie to review a finding by an executive officer or board upon a proper showing therefor. *Chin Chow v. U. S.*, 208 U. S. 8. In this case petitioner claimed, in a deportation case, that he had not been given opportunity to show he was not a Chinese, but had been born in this country. The court said: "The decision of the department is final, but that is on the presumption that the decision was after a hearing in good faith, however summary in form." No such contention was made in the instant case, but there seemed an attempt to interfere with the judgment of the president. "The presumption" of which Justice Holmes speaks is met in the instant case.

The opinion is interesting and well supported in legal principle.

ASSAULT AND BATTERY—ELEMENTS OF DAMAGE IN INSTRUCTIONS TO JURY.

—In *Guttersen v. Jensen*, 170 Pac. 352, decided by the Supreme Court of Washington, there was reversal for error in instruction to the jury.

The nature of the instruction is indicated by what the court says as follows:

"It is argued by the appellant that this instruction is erroneous for two reasons: First, because it tells the jury that if they find the appellant used unnecessary force in repelling an assault by the respondent they should assess against the appellant all damages and injuries sustained by respondent, and, second, that in measuring the damages the jury should take into consideration the injury to the respondent's good repute, his social position and his professional standing."

The court then goes into the circumstances of a *rencontre* between the parties, saying that it seems plain that if appellant was justified in repelling an assault which was made upon him, he was at liberty to use such reasonable force as would repel the assault and would not be liable for any damages on account thereof. If he used excessive force, then it seems plain that he would be liable only for the damages caused by ex-

cessive force and when the court told the jury that, if they found the appellant used excessive force or unnecessary force in repelling any assault they should assess all damages against the appellant, this was plainly error."

The court also further along says: "If the fault was all appellant's, then clearly the associates of the respondent could hold him in no less esteem by reason of the fact that he was unlawfully assaulted upon the public street." It appears that respondent's face was bruised and cut and he suffered pain and shock.

It seems to us that the court in its discussion invades the province of the jury. When it distinguishes as it does between an unlawful assault by appellant and resistance beyond what was necessary to repel an assault, it plainly goes into questions of fact it was the province of the jury to pass upon. This error is quite patent in the view that is taken both in unlawful assault and in resistance to an assault with unnecessary force. In neither case is anything allowed for injury to social position, or professional standing—the former because an unprovoked assault is excused because it is unprovoked, and in the other case because the overresistance is not wholly unprovoked. So between the two it is to be said there is to be no recovery for injury to social position, good repute, or professional standing as arising out of an assault.

Is this true? A blow, indefensible on the part of one who delivers it against another, is the culmination or complete expression of an uttered charge or slander. The public knows, when it hears of it, that it is the physical evidence of an accusation. If an accusation, wrongly made, involves injury to good repute, social position or professional standing, how greatly more is this true, when a blow is aggravation of an accusation? If there is a common brawl, this may be different, and so if received in a general melee. But all of this is to be judged by the jury. As pertinent to the general question of measure of damages in assault and battery we cite *Wingate v. Burton*, 193 Mo. App. 470, 186 S. W. 32; *Trabau v. Benoit*, La. 71 So. 893; *Cooper v. Demby*, Ark. 183 S. W. 185.

INSURANCE—CONSTRUCTION OF FIDELITY BOND AS TO MEANING OF "EMBEZZLEMENT."

—In *Delaware State Bank v. Colton*, 170 Pac. 992, decided by Supreme Court of Kansas, it is held that a surety bond indemnifying a bank against loss occasioned by the fraud or dishonesty of its cashier "amounting to em-

bezzlement or larceny," the quoted words do not, under the rule of construction applying to an insurance company in the business of a surety company charging a premium for bonds, mean embezzlement or larceny in the strict technical sense of those terms.

The court said: "The surety company prepares the bonds on its forms and the courts as a general rule construe them as intended to protect the obligee from loss occasioned by the dishonest and fraudulent acts of the principal, wholly regardless of whether or not the principal might upon the facts established have been convicted of embezzlement or larceny."

It seems to us not so difficult to conclude that an acquittal of a criminal charge of embezzlement or larceny would not be conclusive of an indemnitee's right to recover, as it is to say that there is any reasonable doubt about the meaning of the words of the bond. They intended to put some kind of limitation upon the character of acts of fraud or dishonesty. These general terms are qualified to mean those which amount either to embezzlement or larceny, and not those that do not so amount. The question, in this aspect, however, was not important in the instant case, because the proof showed that the cashier actually had appropriated to his own use money and securities belonging to the indemnitee coming into his custody.

The petition, however, did not allege specifically that the cashier's acts amounted to embezzlement or larceny. The court said this was unnecessary and the proof need not so establish. It seems to us the court was right as to sufficiency of the petition and was wrong as to character of the proof.

The point was made but not referred to specially, that as the bank was an Oklahoma corporation, the laws of Oklahoma should have been pleaded. We do not believe this point was well taken, but we think the proof ought to have shown that the acts complained of amounted to embezzlement or larceny under Oklahoma law. It is possible to conceive that an act amounting to embezzlement or larceny in one state might not amount to that in another. And, also, it is possible to conceive that an indemnitor would take a risk as to any act punishable by law when he would not be willing to take a risk as to an act not punishable. In the latter event he only depends upon the conscience of the cashier, and that, though not necessarily elastic, might have a queer method in self-justification.

THE WAR AND CONTRACTS—ECONOMIC IMPOSSIBILITY EXCUSING BREACH.

A development of the highest interest both to the legal student and to the man of business is taking place in the Law of Contracts. The process is not yet at an end and will likely continue, not only during the remaining period of the war, but for a long time afterward. When is a contract discharged through impossibility of performance? By the Defense of the Realm Act performance is excused in cases where there is direct interference by the Government or any of its departments; then too, a contract is discharged when by operation of law performance becomes illegal. It is not these, or cases such as these, we purpose to deal with now, but the cases in which the conditions under which a contract has to be carried out differ so greatly from those in which it was made as to give ground for the plea of impossibility of performance.

It is a rule of the common law that if a man in unqualified terms contracts to do something, then he must either perform his contract or pay damages for its non-performance. Owing to the obvious hardships which this dogmatic rule presented the courts have never shown a great tendency to press it unduly. Nevertheless on the other hand they have been disposed to hold that mere economic unprofitableness does not entitle a party to a contract to assert impossibility of performance. But the wide spreading effects of this war have caused it to be realized that increased expense may be so great as to amount in law to impossibility, and have brought into prominence the observations of Mr. Justice Maule in the old case of *Moss v. Smith*, (1850,) where he said: "In matters of business a thing is said to be impossible when it is not practicable, and a thing is impracticable when it can only be done at an excessive or an unreasonable cost. A man may be said to have lost a shilling when he has

dropped it into deep water, though it might be possible by some very extensive contrivance to recover it."

To give relief in cases such as these the courts have come to introduce the doctrine of implied condition, the earliest complete statement of which was made by Lord Blackburn in the case of *Taylor v. Caldwell* (1863). After referring to the rule we have mentioned, that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen circumstances the performance has become unexpectedly burdensome or even impossible, his Lordship said: "But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied, and there are authorities which establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, then in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

This doctrine is practically an invention, for when the contract was made the probability is that the parties never thought of the ultimate cause of breach at all; but the court assumes that they both thought of it and were both of one mind about it, and this assumption is logically quite right because the existence of the contract implies agreement on all points. In other words, as it has been popularly put, the court assumes that if, when the parties were actual-

ly concluding their bargain a third party remarked, "In the event of so and so, of course you are agreed to such and such effect," and they would both reply "Oh, of course." The plainest illustration of this doctrine of implied condition occurs in the cases which arose out of the deferred coronation procession on the accession of the late King Edward, the leading case being *Krell v. Hendry* (1903). There Krell contended that his only purpose was to get money by letting his room and that was the whole contract, as he did not guarantee any procession to pass in front of his windows, while Hendry contended that his purpose in entering into the contract was to see a procession. The Court solved the question by finding that the parties had impliedly agreed that the obligation of the contract should cease in the event of the failure of the essential condition that a procession should take place.

Applying this doctrine now to the cases of contracts which have been affected by the war, we revert to the instance where a contract can only be performed at serious pecuniary loss, and the conclusion derivable from the cases on the subject seems to us to be this. If, subsequent to the formation of a contract, an event occurs, of which the effects have not been expressly provided for by the terms of the contract, and causes, or is reasonably likely to cause, such difficulty or delay in performance as amounts to commercial impossibility, or destroys the whole foundation of the contract, either party may claim that it was an implied term of the contract that on the happening of the said event the obligations of the contract should be discharged.

But the expense is not the only consideration which may be pleaded as excusing the contract—there is the matter of delay. "A state of war," says one writer "must be presumed to be likely to continue so long and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure." On the other hand though war is a thing of serious and

indefinite duration, yet, it is a thing which can only be temporary. If, therefore, at the outbreak of war the time during which the contract has to be performed is such that the war is reasonably likely to outlast it, then the contract would be dissolved. But as has been well pointed out by Mr. F. D. Mackinnon, K. C., in his recent pamphlet on this subject the converse proposition, that if the time during which the war is reasonably likely to last is shorter than the period during which the contract has to be performed the contract will not be dissolved, is by no means necessarily true. For "In the case of a contract involving continuous acts of performance over a long period the cessation of performance during part of that period, from inability to perform, may involve so radical an interference with the whole substratum of the contract that the contract will be thereby dissolved even as regards the period during which acts of performance may again become possible."

This is but another statement of the question whether the war dissolves or only suspends a contract and the most recent case on the subject, *Metropolitan Water Board v. Dick Kerr & Coy* (1917), is in favor of termination. The facts of the case were briefly these: Just before the war began the defendants contracted to make a reservoir which was to be completed within six years. The contract contained a stipulation that, if by reason of any impediment the defendants were delayed in the completion, the time might be extended by the plaintiffs' engineer. The carrying on of the work was prevented by the Minister of Munitions, who under his powers caused the plant on the works to be removed. The Court of Appeal held that the interruption thus caused of the work was not such a temporary interruption as could be regarded as falling within the suspensory clause of the contract. The House of Lords has now upheld the Court of Appeal. Wherefore it would seem that these suspensory clauses in contracts en-

tered into before the war, and no doubt, in many contracts entered into since the war, have not the effect of keeping contracts on foot where the object of the contract is in substance frustrated by unforeseen circumstances making performance as contemplated by the parties impossible.

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CONFUSION OF THE TERMS "PROXIMATE" AND "DIRECT."

The terms "proximate" and "direct," as used in connection with the law of damages, have different meanings; and these meanings are probably about as well defined in a general way as terms so comprehensive can ever be. The fact that these words have widely different meanings is not news to any moderately well informed lawyer; but courts have sometimes used them, in the discussion of important cases as if they were synonymous and interchangeable. This may seem unimportant, but the error has clearly had an undesirable influence on the shaping of the law of proximate cause, tending, as it does, to keep us from seeing exactly whether we are headed in the development of this important subject.

"Direct damages are those which are so closely connected with the wrong complained of that they may be said to be involved in the assertion of the right of action. In the case of personal injury, bodily injury and pain; in that of libel, damages to reputation; in that of conversion, loss of the thing converted; in that of trespass upon land, damage to the property; in that of the breach of a contract, the loss of the advantage which was the object of the contract,—are all direct. Proximate damages (which include direct damages) are such as flow proximately from the cause of action, that is, are so connected with it as results of it, that the law regards the per-

son responsible for the cause of action as responsible also for them. Remote damages are all other results not so connected."¹

Not all proximate results are direct; but all direct results are proximate. The latter fact is probably one of the facts resulting in the confusion of the two terms. Perhaps a more potent cause of the confusion is the similarity of the meanings of the two terms in the every-day language of the laity.

Whatever may be the cause of the occasional treating of these words as if they were synonymous, it can safely be said that the above quotation from Mr. A. G. Sedgwick represents the law as exhibited clearly by the overwhelming weight of authority; and it can further be said that any attempt to treat the two words as having the same meaning will result in more of trouble than it is possible to calculate. If we treat both terms as having the meaning properly given to "direct" and say that all damages, in order to be recoverable, must be direct, we eliminate from our law all the possibility of any recovery for any kind of consequential damage; if we treat both terms as having the usual meaning accorded to "proximate," we raise the troublesome question whether we shall then require proof of proximity of cause and result in the most ordinary and most obvious cases of direct damage.

Of all the cases involving the question of proximity, those based upon negligence are the most difficult and frequently the most misleading, the question of the fact of negligence being frequently mixed with the question of the proximate relation of the negligence to the injury. In an Alabama case, a boy, nine and a half years old, tried to climb upon a freight train and thus enjoy a ride. In violation of a village ordinance, the train was then going at a greater rate than four miles per hour. The boy missed his footing, fell and was killed. The court held that the railroad company

was not liable, as its negligence was not the proximate cause of the wrong.² As was pointed out by the author in a footnote to a previous article,³ judgment for the defendant could more easily have been sustained on the simple ground that the defendant had violated no duty toward the boy and that therefore there was no negligence upon which to ground the action. But the court, instead of doing this very obvious thing, proceeded into a discussion of the relation of the violation of the ordinance to the injury, quoting with approval the following passage from 16 Am. & Eng. Enc. Law 431: "To constitute actionable negligence, there must be not only a causal connection between the negligence complained of and the injury suffered, but the connection must be by a natural and unbroken sequence, without intervening efficient causes; so that, but for the negligence of the defendant, the injury would not have occurred. It must not only be a cause, but it must be the proximate—that is, the direct and immediate, efficient—cause of the injury." Probably the first sentence of this quotation would be generally approved; but the latter proposition that negligence, in order to be actionable, "must be the proximate—that is, the *direct* and immediate, efficient—cause of the injury," may well give us pause, since it restricts "proximate" to "direct." If a negligent defendant is never to be held liable for any except direct and immediate effects of his negligence, negligent persons will probably escape free of all liability for most of the injurious consequences of their wrongful acts.

One very well known case,⁴ in which a railroad company was very properly held liable for a miscarriage consequent upon a

(2) Western Ry. v. Mutch, 97 Ala. 194, 11 So. 894, 21 L. R. A. 316, 38 Am. St. Rep. 179. No attempt is made in this article to make an exhaustive study of numerous cases. There have been selected simply a few cases, typical ones, to illustrate.

(3) 83 Cent. L. J. 148 (149).

(4) Brown v. Chicago, M. & St. P. Ry. Co., 54 Wis. 342, 11 N. W. 856, 41 Am. Rep. 41.

(1) Sedg. El. Dam. (2d ed.), p. 45.

long walk which a passenger found necessary because of being negligently put off three miles from her destination, treats the miscarriage as being a "direct" result. According to any proper reasoning, it is logical to treat such a result as being proximate, but it cannot rightly be said to be direct. The case is unquestionably correct in its result, when all the circumstances are considered; but we can make satisfactory sense out of the discussion contained in the case, only by substituting the word "proximate" wherever the word "direct" occurs. The miscarriage was a proximate result, but it was, at the same time, one of the clearest cases of consequential result as contrasted with direct result. Damages assessed for the miscarriage should be classed as consequential, and not as direct. The miscarriage was neither an immediate result nor one necessarily to be expected, but it was clearly proximate in that there was no independent, efficient, intervening cause.

Later, in the same court, in Chamberlain v. City of Oshkosh,⁵ a case wherein a city had negligently permitted a hole to exist in a street, the hole became filled with water, and the water became frozen, thus producing ice, on which a pedestrian fell and was injured, the city was held not liable for the injury, on the ground that "the hole was only the remote cause, or cause of causes, which produced the result, and was not the direct, efficient, or adequate cause, which alone is actionable." The court unquestionably confused "direct" with "proximate," as will be seen by the following extract from the opinion: "The depression was the cause of the water accumulating there, and the water, combined with a low temperature, caused the ice to form which injured the plaintiff. The depression was a remote

(5) 84 Wis. 289, 54 N. W. 618, 19 L. R. A. 513, 36 Am. St. Rep. 928. It is interesting to notice that the Wisconsin court, which has thus used the words "proximate" and "direct" rather loosely in these two cases, has, in its practical application of rules of causation, been, in most cases, far-sighted, liberal, practical and clearly just to the plaintiff who seeks to recover consequential damages. See McNamara v. Village of Clintonville, 62 Wis. 207, 22 N. W. 472, 51 Am. Rep. 722.

cause or cause of causes. The proximate or direct cause was the ice, and this must be the cause of action. '*Causa proxima, non remota, spectatur.*' The proximate, and not the remote, cause must be considered. The cause nearest in order of causation, which is adequate to produce the result, is the direct cause. In law, only the direct cause is considered. These are familiar maxims." If the reasoning here is correct, it follows that consequential damages can never be recovered, and that the holding, by the same court, that the plaintiff in Brown v. Chicago, M. & St. P. Ry. Co., could recover for illness only consequent upon the direct injury, is all wrong; which probably few lawyers would be ready to admit. The whole trouble with the Chamberlain case is that it fails to make any distinction whatever between "direct" and "proximate" and to recognize the fact that consequential damages may be recovered at all, and the error stands out, so poorly embellished, and so glaring, that he who runs may read the mistake and recognize it as such. Fortunately, this mistaken and highly artificial reasoning, which has an appearance of right or logic, only when one quickly glances at the veneer of seemingly plausible statements as to directness and proximity,⁶ is not always followed in cases similar to this one on the facts.⁷ To say that all prox-

(6) Both Brown v. Railway and Chamberlain v. Oshkosh are commonly used as a part of the material for study in law schools; and this should be so, as these cases have always influenced the development of the law of proximate cause in a measure out of proportion to the degree of their accuracy of expression. It is necessary that the student study the loosely reasoned and even the erroneous opinions that have had any real part in shaping our law; but, without text-books or lectures adequate to set the student right on proximate cause, it is probable that the reading of these cases frequently helps to mingle proximity and directness in one confused mass in the student's mind and to cause him to forget that there is any difference between the two terms. The fact that such cases are leading cases, and the further fact that there is an element of truth in their teaching, often tend to make even the most experienced lawyer accept them as law, without questioning their general soundness or calculating the final far-reaching effect of accepting the rule of the particular case (perhaps one of unusual circumstances) as a universal rule of law.

(7) Adams v. Chicopee, 147 Mass. 440, 18 N. E. 231; Gaylord v. City of New Britain, 58 Conn.

imate results are direct, is like saying that all sheep are lambs. Some proximate results are direct, and others are consequential. To say that all results not direct are not proximate, is just as fallacious.

A wrong may be a cause of causes and still, in the legal sense, be proximate to the injury inflicted. It is sufficient that it has "put in operation the force which was the immediate and direct cause of the injury."⁸

Around no legal subject, probably, has a more intense, varied, many-sided, and prolonged struggle been waged than that which has long raged, and will continue to rage around causation. Probably there has been as much of loose thinking and loose use of words on this as there ever was on any legal subject. Part of this is due to a failure to settle as nearly as possible upon one legal meaning for "direct." Probably most of us agree that, strictly speaking, "direct" and "proximate" are not synonymous; and probably most of the judges and writers who have fallen into the use of the word "proximate" as meaning "direct," would not care to argue seriously that only direct damage is ever proximate. Let judicial language in such cases be so framed as to say what is meant to be said; let there be greater strictness of expression in all decisions; and we shall then have judicial opinions that will constitute satisfactory precedents for the decision not only of exactly similar cases, but also of cases of the same general class. In construing many of the cases on causation, including a number of the leading ones, we are obliged to consider them as precedent rather for what they mean than for what they say.⁹ Perhaps

398, 20 Atl. 365, 8 L. R. A. 752; McCloskey v. Moles, 19 R. I. 297, 33 Atl. 225; and other cases.

(8) Griggs v. Fleckenstein, 14 Minn. 81, 100 Am. Dec. 199. This principle is followed in many cases.

(9) Treating Brown v. Railway as if it really meant "proximate" where it said "direct," the writer used the case as an illustration in 83 Cent. L. J. 148 (151-152), as others have used it, not even making mention of the discrepancy in terms, as he felt warranted in using the case as a precedent for the real principle for which it certainly stood, although the important rule of the case was somewhat beclouded by the inexact use of terms by the court.

with the development of our modern case law and the increase of law study by the case method, the art of verbal definition is being lost anyway,—and few real scholars will regret the passing of the time when the learning of mere legal definitions constituted a large part of a law curriculum: but, if we are to have any case precedents worth while, in causation or any other subject, we must come to have each principal term used consistently with a uniformity of meaning. The uniform meanings of "direct" and "proximate" should be those acknowledged as correct by the great weight of authority.

RALPH STANLEY BAUER.

Atlanta, Georgia.

HABEAS CORPUS—RES ADJUDICATA.

Ex parte SMITH.

St. Louis Court of Appeals. Missouri. Feb. 7, 1918.

200 S. W. 681.

A Judgment in habeas corpus proceedings, remanding a child, is not res adjudicata as to right of petitioner to prosecute habeas corpus before the appellate court.

ALLEN, J. The petitioner, Edwin F. Smith, Jr., seeks by a writ of habeas corpus issued from this court to obtain the custody of his daughter, Anna Rosalind Smith, about six years of age, from the respondents, Fred H. Kicker and Anna Kicker, the maternal grandparents of the child.

The petition for the writ avers that the petitioner is the father of the child, and that the mother thereof is a person of unsound mind; that respondents have possession of the child, and refuse to deliver her to petitioner's care and custody, and are illegally restraining her of her liberty. The petition further sets up that heretofore, at the October term, 1914, of the circuit court of the city of St. Louis, petitioner instituted a proceeding in habeas corpus against these respondents for the possession and custody of the child; that the proceeding came on to be heard by the circuit court on November 25, 1914, and that there-

upon the circuit court remanded the child to the custody of these respondents, making certain further orders in the premises, and by its judgment attempted to reserve jurisdiction of the cause for the purpose of making such other and further orders therein from time to time as might, in the opinion of the court, be required by changed conditions. And the petitioner avers that all of the aforesaid order and judgment of the circuit court, except so much thereof as remanded the custody of the child to these respondents, is null and void, for the reason that the court had no jurisdiction to make the same; and petitioner alleges that he believes that these respondents "justify their restraint of the said Anna Rosalind Smith by said null and void order and judgment." And it is averred that no application for the relief sought herein has been made to or refused by any superior court or officer.

Respondents by their return admit that they are the maternal grandparents of the child, that petitioner is the father thereof, and that the mother of the child, wife of petitioner, is a person of unsound mind. And respondents admit that they have the custody of the child, but deny that they are illegally restraining the child of her liberty. Respondents state that they hold possession of the child, and are exercising custody and control over her, under and by virtue of the order and decree of the circuit court of the city of St. Louis, referred to in the petition. Respondents deny that such order or decree, or an portion thereof, is void, "and respectfully submit that said circuit court of the city of St. Louis, state of Missouri, has continuing jurisdiction, as reserved in said order and decree, over the custody and control of the person of said minor child, and that any proceedings for the modification of said order, or for the change of the custody or control of said minor, should be properly instituted and prosecuted in said court." And respondents pray that the child be remanded to their custody.

Upon the filing of the return the petitioner moved for judgment thereon; and the issues of law thus arising are presented for our determination.

Respondents rely upon the proposition advanced by their learned counsel that the judgment in the habeas corpus proceeding in the circuit court is res adjudicata as to petitioner's right to the custody of the child, unless petitioner's right thereto be made to appear by reason of matters occurring since the rendition of the judgment by the circuit court, creating new

or changed conditions and circumstances. But under the law in this state we regard it as entirely clear that the judgment in the habeas corpus proceeding in the circuit court is to no extent a bar to the prosecution by petitioner of the proceeding before us. In *Weir v. Marley*, 99 Mo. 484, loc. cit. 488, 12 S. W. 798, 6 L. R. A. 672, it is said by Brace, J.:

"That the doctrine of res adjudicata is not applicable to the case of a refusal to discharge and that the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment, is not conceded, and is not limited in this state by statutory enactment, except in the one particular that the applicant for the writ in his petition must state 'that no application has been made or refused by any court officer or officer superior to the one to whom the petition is presented.' Subject to this limitation one restrained of his liberty may in succession apply to every court or officer authorized to issue the writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint. * * * From these cases may be deduced the doctrine that the principle of res adjudicata does not apply in cases of habeas corpus to judgments remanding the prisoner, or to judgments discharging the prisoner, where a new state of facts, warranting his restraint, is shown to exist different from that which existed at the time the first judgment was rendered. That it does apply to a judgment discharging the prisoner, where no such new state of facts is shown, may as readily be deduced from the case *Ex parte Jilz*, 64 Mo. 205 (27 Am. Rep. 218). The distinction thus made between judgments remanding and those discharging the prisoner grows out of the nature of the writ whose *raison d'être* is the protection of personal liberty. It loses none of its characteristics when used for the purpose of obtaining the custody of children, and the same analogies ought to obtain in such cases as when used simply for the purpose of discharging a prisoner from illegal restraint."

In the case entitled *In re Clark*, 208 Mo. 121, 106 S. W. 990, 15 L. R. A. (N. S.) 389, where the petitioner sued out the writ to secure his release from custody under a commitment for contempt of court, the Supreme Court followed *Weir v. Marley*, supra, as to the distinction to be made in habeas corpus between judgments remanding and those discharging the prisoner.

In the late case of *In re Breck*, 252 Mo. 302, 158 S. W. 843, a proceeding involving the custody of children, but where in the prior proceeding in habeas corpus, in the circuit court, the petitioner therein, the father (respondent in the Supreme Court) had obtained the custody of his child, the courts referred to the

pronouncement in *Weir v. Marley*, *supra*, as the established doctrine in this state.

In *Orey v. Moller et al.*, 142 Mo. App. 579, 121 S. W. 1102, the petitioner, the father, sought to obtain the custody of his daughter by habeas corpus from one Moller and wife. The petitioner had previously instituted a like proceeding in the circuit court of St. Louis county, which had been determined adversely to him. The question as to the effect of that adjudication was disposed of by this court, in an opinion by Goode, J., in the following language: "The decision of the learned circuit judge, adversely to the petitioner, cannot be taken as res adjudicata of his right. *Weir v. Marley*, 99 Mo. 484, 12 S. W. 798 (6 L. R. A. 672)."

Respondents' learned counsel urges that what was said in *Weir v. Marley*, *supra*, touching the matter in hand, was mere dicta, and is not controlling upon us. As to this we need only say that in *Orey v. Moller*, *supra*, this court distinctly recognized the doctrine of *Weir v. Marley*—which in its general aspect is by no means peculiar to this jurisdiction—as being applicable where the proceeding in habeas corpus is one involving the right to the custody of minor children; and we see no reason to depart from that ruling.

It is true that there is no lack of authority in other jurisdictions to the effect that where the writ of habeas corpus is used, as is said, not as a writ of liberty in the strict sense of the term, but only indirectly or theoretically as such and as a means for inquiring into and settling the rights of conflicting claimants to the care and custody of minor children, the doctrine of res adjudicata will apply, even where the former judgment of an inferior court, in habeas corpus, was one of remand, unless there has been a change of conditions or circumstances. See *Knapp v. Tolan*, 26 N. D. 23, 142 N. W. 915, 49 L. R. A. (N. S.) 83, *Cormack v. Marshall*, 211 Ill. 519, 71 N. E. 1077, 67 L. R. A. 787, 1 Ann. Cas. 256. But this doctrine, so far as we are aware, has never been applied in this state. Under our decisions it appears that the petitioner is entitled to have his right to the custody of his child adjudicated by this court, notwithstanding the prior adjudication, adverse to him, in the circuit court.

It follows that the petitioner is entitled to be awarded the custody of the child. While the paramount consideration is the welfare of the child, the petitioner, as parent, is entitled to the custody of his child, unless it is made to appear that the best interest of the child demands he should be deprived of such custody.

Respondents have not set up that petitioner is unfit or unworthy to have the care and maintenance of the child, or any other reason why he should be deprived of the custody thereof. The presumptions are with the petitioner, and judgment must accordingly go in his favor. See *Weir v. Marley*, *supra*; *Orey v. Moller*, *supra*; *Ex parte Smith*, 193 S. W. 288.

It is therefore considered, ordered, and adjudged that the said minor child, Anna Rosalind Smith, be and she is hereby discharged from the custody of the respondents; and that the respondents, Fred H. Kicker and Anna Kicker, be and they are hereby ordered to deliver over said child into the custody of the petitioner, Edwin F. Smith, Jr., forthwith.

REYNOLDS, P. J., and BECKER, J., concur.

NOTE.—Res Judicata as Applicable to Judgment in Habeas Corpus for Custody of Child.—We entertain a doubt of the rule followed by many courts of the truth of the principle that in a case involving the liberty of an applicant for writ of habeas corpus, the decision denying discharge is in no way *res judicata*, because, as said in *Weir v. Morley*, 99 Mo. 484, 12 S. W. 798, 6 L. R. A. 672, "the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment." It adds nothing to legal rights that a country may vest jurisdiction in one or more courts, especially if it be conceded that the only court therein having such jurisdiction may not be applied to over and over again, when it has refused to issue the writ. The right of importunity is or not an inviolable right and it is no less inviolable where there is one court to be applied to than where there are several. Were this not so, then, the right might be different in one state, and even within local subdivisions of the same state, than in another state or subdivision. Take for example the city of St. Louis, which has many circuit judges, each of them having the same jurisdiction in departments of the circuit court. In Kansas City there may be the same arrangement but there are fewer judges. Then in some counties of the state there is only one judge of the circuit court. In St. Louis the applicant may apply to each of the judges, in Kansas City to each of a fewer number, and in such counties as spoken of the applicant is concluded by one application. The rights of an applicant in St. Louis or Kansas City are enlarged beyond what an applicant in the county possesses. If this is true, what bearing has the Missouri statute in requiring an applicant "that no application has been made or refused by any court or officer superior to the one to whom the petition is presented?"

Re King, 66 Kan. 695, 72 Pac. 263, 67 L. R. A. 783, the rule adverted to is stated to have given rise to a conflict of decisions, as we think it well might. There is cited *re Snell*, 31 Minn. 110, 16 N. W. 692, which shows this conflict, but there it is said: "We may rest with comfortable assurance upon the fact that, after many years of trial in this country and centuries of trial in England, the

right to successive suits has not been found to work any serious practical inconvenience." It would seem, therefore, not to be so much a rule of principle as one not working intolerable inconvenience.

But taking the rule in jurisdictions where recognized, how is it applied in habeas corpus cases regarding custody of children?

In the King case it is said that a writ for such custody is not one involving the liberty of the citizen, because "the question is not really whether the infant is restrained of its liberty, but who is entitled to its custody? * * * The gist of the charge is not that the child is unlawfully deprived of its liberty but that such restraint is in prejudice of the rights of the relators to its custody." This is a just distinction, especially as confined to rights of relators, that is even whether the rule in real liberty cases is one of principle or of practice.

In re Sneden, 105 Mich. 61, 62 N. W. 1009, 55 Am. St. Rep. 435, the rule is stated to be that: "Whatever may be the rule respecting a person imprisoned, the general rule is, that as to the custody of children, the determination of a court in habeas corpus is conclusive in a subsequent application for the writ, unless some new fact has occurred which has altered the status of the case." There are cited both text-books and authority in some abundance in support. This, however, is so only as to the same parties upon the same state of facts. *State ex rel. Lembke v. Bechdel*, 37 Minn. 360, 34 N. W. 334, 5 Am. St. Rep. 854; *Taylor v. Neither*, 108 Ga. 765, 33 S. E. 420; *Slack v. Perrine*, 9 App. D. C. 128; *Kirkland v. Canty*, 122 Ga. 261, 50 S. E. 90.

The rule as to right to apply over and over again to different judges, conceding such right in real liberty cases, is not applicable in a child custody case. *Knapp v. Tolan*; 26 N. D. 23, 142 N. W. 915, 49 L. R. A. (N. S.) 83.

In Bleakley v. Barclay, 75 Kan. 462, 89 Pac. 906, 10 L. R. A. (N. S.) 230, the King case, *supra*, is much limited in application.

If subsequent proceedings are different in form, the adjudication in a prior habeas corpus proceeding involving custody is conclusive. *Re Clifford*, 37 Wash. 460, 79 Pac. 1001, 107 Am. St. Rep. 819.

Thus in a subsequent divorce proceeding where there is no material change in conditions. *Dawson v. Dawson*, 57 W. Va. 520, 50 S. E. 613, 110 Am. St. Rep. 800.

In Bedford v. Hamilton, 153 Ky. 429, 155 S. W. 1128, it was held that a judgment in favor of a father as to custody restoring a child to him as against a Widows and Orphans' Home, to which it had been committed, was not conclusive against such Home in an equitable action by it, because the court is always open for the welfare of the child as a paramount consideration.

So it seems that the instant case was decided properly, whether judgment in a real liberty case has any conclusiveness about it or not. The welfare of the child is the thing of paramount importance, but so far as applicants are concerned there ought to be some change in circumstances. If only applicants' rights are involved there is no just reason for their not being concluded, as is the general rule regarding *res judicata*.

C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF THE MEETING OF THE KANSAS BAR ASSOCIATION.

At the annual meeting of the Kansas State Bar Association held in Topeka recently, members of the Association, and lawyers generally, who are serving in the army were remembered in several different thoughtful directions. So also were the dependents of such soldiers thoughtfully remembered. It may be interesting to note such actions which are here set out.

The first action taken was immediate after the session was called to order. Judge John C. Hogan, chairman of the Executive Council presented a resolution in writing and moved its adoption. The same was adopted by unanimous standing vote as follows:

The Bar Association of the State of Kansas declares its absolute and unqualified loyalty to the Government of the United States and pledges its members to the continued prompt service so cheerfully and gladly rendered by our profession in all parts of the union.

Believing that the future freedom, security and prosperity of our country depend upon the defeat of German military power in the present war, we urge the most vigorous possible prosecution of the war, with all the strength of men, materials and money which the country can supply.

As a slight evidence of our appreciation of the sacrifice being made by the members of this association who have joined the military forces of the United States, we hereby grant to them leave of absence and remission of dues during the period of their service in the army.

At one session of the meeting O. E. Hungate at the request of the Military Sisterhood of Kansas, offered the following resolution relating to free legal services by the members of the State Bar Association to soldiers in the field and their dependents, which was also unanimously adopted.

"BE IT RESOLVED, That the State Bar Association of Kansas and its members hereby tender to the families and dependents of soldiers in the fields who may stand in need of

protection, assistance, necessary legal advice and other professional services free of charge."

At another session Robert Stone called to the attention of the Association a resolution which was adopted by the American Bar Association at its meeting in Saratoga Springs, on September 4, 1917, which reads as follows:

"Resolved, That the Executive Committee of the American Bar Association recommends to the various state and local bar associations of the United States that they undertake war work along the following lines:

"(a) Rendering legal assistance to those entering the federal service and to exemption boards.

"(b) Conservation of the practice of lawyers entering such service.

"(c) Relief, where not otherwise provided for, of the families of lawyers engaged in such service.

"(d) Assist the federal and state authorities in all activities in connection with the war, including the furnishing of capable public speakers for the promotion of patriotism and patriotic endeavor.

"And it is further recommended that the work of the various state and local bar associations, along the foregoing lines be, so far as possible, co-ordinated and standardized."

Mr. Stone then moved that this association endorse said resolution and each section thereof, and that the executive committee be instructed to take such steps as would standardize the war activities of the state and local bar Associations of Kansas, and so far as possible co-ordinate them with one another, and with the activities of the American Bar Association, which motion was unanimously adopted.

BAR ASSOCIATION MEETINGS FOR 1918— WHEN AND WHERE TO BE HELD.

American—Cleveland, Ohio, at Hotels Win-ton and Statler; August 28, 29 and 30.

Arkansas—Little Rock, May 28 and 29.

California—San Jose, June 6, 7 and 8.

Georgia—Tybee Island, May 31, June 1 and 2.

Illinois—Chicago, Hotel La Salle, May 31 and June 1.

Louisiana—New Orleans, April 19 and 20.

Mississippi—Jackson, May 1.

HUMOR OF THE LAW.

Quite a bit of public comment upon the lawyer is condemnatory. Oftentimes the condemnation is of a humorous nature. In the February, 1917, number of Current Events, there is a list of questions answered by applicants for admission to university classes. One of these pertained to the history of the early Gauls, and the answer of the party who was taking the examination was, "There were no Christians among the early Gauls; they were all mostly lawyers."

Too Busy.—An Italian, having applied for citizenship, was being examined in naturalization court.

"Who is the President of the United States?"

"Mr. Wils."

"Who is vice-president?"

"Mr. Marsh."

"If the president should die, who then would be president?"

"Mr. Marsh."

"Could you be president?"

"No."

"Why?"

"Mister, you 'scuse, please, I vera busy worka da mine."—Everybody's Magazine.

A driver who had been brought before the court charged with cruelty to animals admitted that he had driven a galled mule, but demanded acquittal on the testimony of a veterinarian, who declared that the sore on the mule's back did not pain the animal in the least. The judge listened to the long technical opinion, and then asked where the mule was. When he heard that it was harnessed to a wagon that stood in front of the court house, he adjourned the court for five minutes.

He took his cane and proceeded to the street, went up to the mule and with the end of his cane gently touched the sore spot on the animal's back. The mule promptly tried to kick the dashboard off the wagon. Once again the judge touched the sore spot with his cane, and the mule responded as before.

The judge returned to the bench and ordered the prisoner to appear before him.

"With all due respect to the expert testimony you have introduced in your behalf to show that the mule's back does not pain him, I will fine you fifty dollars," announced the judge. "I asked the mule if the sore hurt him, and he said it did."—Case and Comment.

WEEKLY DIGEST

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1. Accord and Satisfaction — Evidence. — Where fraternal insurer paid beneficiary in benefit certificate twice amount of premiums paid in by member on theory that he had committed suicide, and in an action for full amount asserted that payment was an accord and satisfaction, payment cannot be sustained as accord and satisfaction, there being no new contract between parties or consideration.—*Zinke v. Knights of Maccabees of the World*, Mo., 200 S. W. 99.

2. Adverse Possession—Prescription. — Cutting choice trees here and there throughout a large tract of land, held not such continuous, uninterrupted, public and unequivocal possession as is required by Civ. Code, art. 3487, to constitute prescription.—*Railsback v. Keith*, La., 77 So. 586.

3. Attachment—Attachable Credit. — Where plaintiff gave deed absolute as mortgage and paid the debt, but title remained of record in the grantee, the grantee had bare legal title, not subject to attachment on judgment against him for tort, which was not a debt contracted in faith of the record justifying reliance thereon by attaching creditor.—*Shaw v. Jackson*, Conn., 102 Atl. 736.

4. Attorney and Client—Disbarment. — Disciplinary proceedings are not instituted to collect debts due client, but to inquire into profes-

sional conduct; and payment while procedure is pending in no way condones offense.—*In re Flowerman*, N. Y., 168 N. Y. S. 860.

5. Disbarment. — An attorney, who converts to his own use money received in his professional capacity from clients for other specific purposes, will be disbarred.—*In re Rini*, N. Y., 168 N. Y. S. 859.

6. Equitable Assignment. — Agreement that attorney should receive for his services \$5,000 out of final payment by city to defendant corporation, under construction contract, constituted attorney an equitable assignee of his stipulated share of payment.—*Lynch v. Conger*, N. Y., 168 N. Y. S. 855.

7. Bankruptcy—Conditional Sale. — A contract of conditional sale, under which a bankrupt obtained property, although unrecorded, held valid under the statutes of Oklahoma, as against creditors who had acquired no lien on the property.—*In re Terrell*, U. S. C. C. A., 246 Fed. 743.

8. Extinguishment of Debt. — Where plaintiff had negotiated note given it by defendant and sent defendant a check with the notation, "To be used in part renewal of note," proving up in bankruptcy the note which had not been taken up as directed, but did not extinguish plaintiff's claim for the amount of the check.—*R. S. Howard Co. v. International Bank of St. Louis*, Mo., 200 S. W. 91.

9. Landlord's Lien. — As Rev. St. Tex., art. 5490, gives a landlord a lien on personal property contained in leased premises for balance of current year, landlord, though his claim be not provable against general estate, may prove same on bankruptcy of tenant and enforce it against property subject to lien.—*Lontos v. Coppard*, U. S. C. C. A., 246 Fed. 803.

10. Proof of Claim. — Under Bankruptcy Act, date of filing petition must be regarded as date when provability of claims is to be determined; and, where claims of petitioning creditors were on that date provable, petition is not subject to demurrer, though claims of petitioning creditors might not have been provable on day when act of bankruptcy occurred.—*In re Van Horn*, U. S. C. C. A., 246 Fed. 822.

11. Special Commission. — Under Bankruptcy Act, July 1, 1898, § 38a, and General Orders in bankruptcy Nos. 12 and 27 (89 Fed. vii, xi, 32 C. C. A., xvi, xxvii), held that it was irregular for trustee to apply to District Court for an order directing bankrupt to turn over monies and for District Court to refer same to referee as a special commissioner, as petition should have been presented to referee in the first place.—*In re Nankin*, U. S. C. C. A., 246 Fed. 811.

12. Summary Proceedings. — While court of bankruptcy may not in summary proceedings determine sufficiency of truly adverse claim, yet such court may take jurisdiction of petition by trustee for order requiring claimants to turn over to him property belonging to bankrupt, where claim made after fraudulent transfer was founded upon patent and flagrant fraud.—*In re Resnek, Shapiro & Co.*, U. S. C. C. A., 246 Fed. 879.

13. Trustee. — A trustee in bankruptcy represents not only landlord, but other creditors, and his occupancy of demised premises after adjudication cannot be construed as adverse to

landlord for purpose of defeating his lien for rent.—*Lontos v. Coppard*, U. S. C. C. A., 246 Fed. 803.

14. **Banks and Banking**—Notation on Check.—Where plaintiff sent check with notation "To be used in part renewal of note" to a third person, who deposited the check with defendant bank, the bank's action in charging the account of the third person with the amount of two other notes which the bank had previously discounted and which had been dishonored did not affect defendant bank's right to retain the proceeds of the check.—*R. S. Howard Co. v. International Bank of St. Louis*, Mo., 200 S. W. 91.

15.—Principal and Agent.—Where bank cashier bought stock through defendants, and a third person discounted a collateral note with the bank, the proceeds being placed to the cashier's credit, and the cashier deposited the stock and the note with the bank and later, without consent of the bank, took the stock, returned it to defendants, who sold it, the bank could recover the amount received by defendants therefor.—*First Nat. Bank of Highbridge*, N. J. v. Hudson, N. Y., 118 N. E. 506.

16.—Subscription Contract.—Where bank availed itself of subscription to stock made before it was formed, and received price paid, and issued stock to subscriber, thereafter treating him as shareholder, subscriber and bank were bound by subscription contract.—*Stone v. Walker*, Ala., 77 So. 554.

17. **Bills and Notes**—Joint Liability.—Note reciting, "I promise to pay," and signed by two or more persons, is a joint and several obligation, irrespective of whether one or more of the signers may in fact be sureties.—*Johnson v. Georgia Fertilizer & Oil Co.*, Ga., 94 S. E. 850.

18.—Notation on Check.—Notation on back of check, "To be used in part renewal of note," did not destroy its negotiability, but was a statement of the transaction which gave rise to the instrument within Rev. St. 1909, § 9974, providing that such a statement does not render a promise to pay conditional.—*R. S. Howard Co. v. International Bank of St. Louis*, Mo., 200 S. W. 91.

19. **Brokers**—Procuring Purchaser.—Broker employed to procure purchaser for stock of goods was entitled to commission, though he utilized services of another in seeking purchaser, one of employers knowing it.—*Harris v. Foerster*, Mo., 200 S. W. 118.

20. **Building and Loan Associations**—Withdrawals.—Requirement of Laws 1913, p. 326, that stockholder withdrawing from building and loan association shall give notice, being for benefit of association, is waived by its payment without objection.—*Huber v. Home Savings & Loan Ass'n*, Wash., 169 Pac. 979.

21. **Carriers of Goods**—Initial Carrier.—Where interstate shipment of goods was damaged by defendant initial carrier or its connecting carrier, superior court of county of destination has jurisdiction of suit for damages against initial, non-resident carrier.—*Adair v. Atlantic Coast Line R. Co.*, Ga., 94 S. E. 840.

22.—Rates.—A tank wagon necessary to use with a traction engine and shipped with the engine, should be shipped under the same classification as to freight rates as the engine, and

it is immaterial that each could be used without the other.—*Louisville & N. R. Co. v. Newell*, Ala., 77 So. 553.

23.—Reparation.—Where Interstate Commerce Commission ordered excessive rate reduced, and ordered reparation, parties making the over-payments held entitled to recover them, though they were able to pass on the damage sustained by collecting the amounts from purchasers.—*Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, U. S. S. C., 38 Sup. Ct. 186.

24.—Side Tracks.—That side tracks were on occasions used for loading or unloading cars with teams, etc., where they were intended to serve elevator, did not convert tracks into ordinary team tracks, and warrant charges based on such status.—*State Public Utilities Commission v. Chicago, P. & St. L. R. Co.*, Ill., 118 N. E. 427.

25. **Carriers of Passengers**—Crossing Accident.—Motorman of street car, who saw plaintiff standing in usual place to board car bound other way, could assume plaintiff was not crossing over, especially that she would not step any nearer to single track.—*Campbell v. Richmond Light & R. Co.*, N. Y., 168 N. Y. S. 813.

26.—Riding on Footboard.—Where carrier permits passenger to ride on footboard of open car, it must use a high degree of care in operating that car and other cars to prevent injury.—*Capuono v. Rhode Island Co.*, R. I., 102 Atl. 721.

27. **Chattel Mortgages**—Description of Property.—Chattel mortgage describing logs as in mortgagor's boom, though they did not reach the boom for 12 days thereafter, held good between the parties, and against the parties not acquiring rights before they reached the boom.—*Otto v. England*, Wash., 169 Pac. 964.

28.—Growing Crops.—Mortgagor of crops not having potential interest in lands on which they were grown at time of execution of mortgages to defendant, such mortgages did not convey interest in crops grown on lands, as against plaintiffs, as later mortgagees.—*Hanner & Son v. Johnson*, Ala., 77 So. 446.

29. **Commerce**—Employe.—Right of action of railroad employe suing in state court is not, where there was evidence of negligence of engineer in charge of train causing accident, affected by reason of fact that some of cars in train were used in interstate commerce, thus bringing case within federal Employers' Liability Act.—*Harris v. St. Louis & S. F. R. Co.*, Mo., 200 S. W. 91.

30.—Intoxicating Liquors.—The state prohibition statutes, as extended by federal Webb-Kenyon Bill, are inapplicable to transportation of intoxicating liquors through Alabama in transit from Georgia to Florida.—*Moragne v. State*, Ala., 77 So. 322.

31. **Conspiracy**—Overt Acts.—Where conspiracy was formed in Illinois to obtain money by means of confidence game or false pretenses, defendant, a conspirator, was guilty whether the field of actual operation of conspiracy was in Illinois or Indiana, and whether it was accomplished.—*People v. Buckminster*, Ill., 118 N. E. 497.

32. **Constitutional Law**—Forfeiture.—Forfeiture of lodge property of a subordinate lodge by act of Supreme Lodge without notice, charges,

hearing or finding of guilt would be a deprivation of property without due process of law in violation of Const. U. S. Amend. 14.—Supreme Lodge of the World, Loyal Order of Moose, v. Los Angeles Lodge, No. 386, Loyal Order of Moose, Cal., 169 Pac. 1040.

33. **Contracts**—Annulment.—Contract should not be annulled because one of parties was insane when it was made, if it was made before filing of suit to interdict him, except on allegation and proof that he was notoriously insane, or that other party could not have been deceived as to his state of mind.—*Twomey v. Papalia*, La., 77 So. 479.

34.—**Bonus**.—Under contract entitling agent to bonus on sale and settlement for 1,000 tons of fertilizer, he was not entitled to bonus, where less than 1,000 had been collected for.—*C. Ober & Sons Co. v. Wm. G. Smith, Inc.*, Va., 94 S. E. 787.

35.—**Resale**.—Where purchaser agrees to give seller half of net profits from a resale, there cannot be a recovery until proceeds of resale have been reduced to money, or so appropriated as to be equivalent to receipt of money value.—*Stokes v. Walker*, Ga., 94 S. E. 841.

36. **Damages**—Earning Capacity.—On issue of injured servant's decreased earning capacity, where he testified that for three years he had satisfactorily served defendant as machinist, his evidence as to usual wages of expert machinists in community was admissible.—*Camilla Cotton Oil & Fertilizer Co. v. Walker*, Ga., 94 S. E. 855.

37.—**Measure of**.—Recovery by railroad employee in action governed by federal Employers' Liability Act is not limited to amount equivalent to present value of impairment of his future earnings at time of ascertainment by jury.—*Harris v. St. Louis & S. F. R. Co.*, Mo., 200 S. W. 111.

38.—**Mental Suffering**.—Where constable making a forcible and malicious levy inflicted no wound or bruise upon plaintiff, but his conduct resulted in a miscarriage accompanied by severe pain, such result could not be classed as mental as distinguished from physical suffering.—*Townsend v. Seefeld*, Kan., 169 Pac. 1157.

39. **Deeds**—Undue Influence.—Deed of gift by man 85 years old and physically infirm of the chief part of his small farm to daughter, reserving life estate, he having other children who had manifested filial duty towards him, will not, after his death, be set aside as improvident.—*Dill v. Karcher*, Del., 102 Atl. 781.

40. **Divorce**—Contempt.—Where divorced father's inability to contribute towards his children's support is bona fide, the court cannot, by contempt proceedings, compel him to change his occupation so as to acquire necessary funds.—*Wells v. Wells*, Wash., 169 Pac. 970.

41. **Dower**—Estoppel.—A woman obtaining rabbinical divorce, knowing of and acquiescing in husband's remarriage, and herself marrying and living with another, held, estopped to claim dower as against bona fide purchasers from first husband, misled by her conduct.—*Kantor v. Cohn*, N. J., 168 N. Y. S. 846.

42. **Easements**—Permissive Use.—The use of a passway across another's land, if permissive

only, gives the party using it no enforceable right, regardless of the duration of the use.—*Williams v. Deskins*, Ky., 200 S. W. 1.

43. **Eminent Domain**—Abandonment.—Railroad which had no tracks or right of way through part of city, but operated by arrangement over tracks of another company, held not to have abandoned its right under Rev. St. 1909, § 3049, to condemn land for additional trackage.—*Chicago, B. & Q. R. Co. v. McCooey*, Mo., 200 S. W. 59.

44. **False Imprisonment**—Arrest.—Where policemen broke a lock and entered a home and at the point of a gun arrested plaintiff, who was asleep in bed, had committed no offense in their presence or otherwise, and without warrant for his arrest, and without probable cause, for an alleged offense in another state, such arrest was unauthorized by Cr. Code Prac., § 36, and was a violation of law for which the officers are liable.—*Morton v. Sanders*, Ky., 200 S. W. 24.

45.—**Respondeat Superior**.—Where everything passenger on train did in relation to arrest of two boys was done at request and advice of conductor, passenger's acts must be treated as those of conductor as to liability of railroad for arrest.—*Gulf, C. & S. F. Ry. Co. v. Besser*, Tex., 200 S. W. 263.

46. **Gas**—Ordinance.—Burns' Ann. St. 1914, § 8655, subd. 31, providing that cost of connecting gas, water, etc., mains with private property may be assessed against abutting property, does not authorize city ordinance provision, requiring gas company to make connections.—*City of Indianapolis v. College Park Land Co.*, Ind., 118 N. E. 356.

47. **Habeas Corpus**—Contempt.—Notwithstanding Rev. St. 1909, § 2475, prohibiting inquiry into justice or propriety of commitment for contempt in habeas corpus proceedings by one committed for direct contempt, the Supreme Court will inquire into the truth of findings of judgment if their truth is denied by contemner.—*Ex parte Howell*, Mo., 200 S. W. 65.

48.—**Remedy**.—Person in custody under magistrate's commitment will not be discharged on habeas corpus because case was not certified to juvenile court, as he might raise every question in the proceeding on the information filed against him.—*Ex parte Northon*, Cal., 169 Pac. 1051.

49.—**Res Judicata**.—Successive writs of habeas corpus may be had by application to superior courts, where person seeking benefit of writ has been remanded to custody, but where he has been discharged, action is res adjudicata in subsequent writ, unless there has been change in circumstances.—*State ex rel. Coffield v. Buckner*, Mo., 200 S. W. 94.

50. **Highways**—Law of Road.—Acts Ex. Sess. 1915, p. 113, § 11, as penalizing failure of operator of motor vehicle meeting approaching vehicle to turn his vehicle to right and give one-half of roadway, if practicable, and fair opportunity of passing without unnecessary interference, is too uncertain and indefinite to be enforceable.—*Hale v. State*, Ga., 94 S. E. 823.

51.—**Obstruction**.—The placing of a grindstone on an iron frame about four feet high on the traveled portion of a public road in a position to come suddenly in view in coming over an embankment is calculated to frighten an

ordinarily gentle horse, and is evidence of negligence.—*McGolderick v. Wabash Ry. Co.*, Mo., 200 S. W. 74.

52. **Husband and Wife—Separate Property.**—That the wife's separate property was improved by wire fence bought by her husband on his own credit would not make her liable in law to the seller for the price of the goods.—*Fisher v. Darsey*, Ga., 94 S. E. 839.

53. **Injunction—Ejectment.**—Injunction lies to enjoin an action of ejectment, the defense to which is an equitable title, arising from an agreement of tenants in common to divide, containing no works of conveyance.—*Boole v. Johnson*, Del., 102 Atl. 782.

54. **Premature Insurance—Injunction.**—Injunction will lie on the part of a town to restrain the repair of a building in violation of a fire ordinance, requiring that a building may not be extensively repaired until a plan is presented and approved.—*Inhabitants of Town of Skowhegan v. Heseltion*, Me., 102 Atl. 772.

55. **Insurance—Accident.**—Practice of accident insurance association in receiving dues and assessments after due date amounts to a waiver of by-laws, declaring a forfeiture for the default, and estops it from invoking a forfeiture in action on contract.—*Suites v. Order of United Commercial Travelers of America*, Minn., 166 N. W. 222.

56. **Accident.**—Under contract of accident insurance, making insurer liable for death by "the collapse of a building," liability arises when insured is killed by collapse of any substantial portion of building.—*Great Eastern Casualty Co. v. Blackwelder*, Ga., 94 S. E. 843.

57. **Appraisement.**—Where fire policy provided for appraisal on disagreement as to amount of loss, and such appraisal was had, action thereafter is one not on award of appraisers, but on fire policy to recover appraisement.—*Pierce's Loan Co. v. Netherlands Fire & Life Ins. Co. of Hague*, Holland, Mo., 200 S. W. 120.

58. **Benefit Society.**—Clause in mutual benefit policy, avoiding liability for death if insured was killed while engaged in any illegal business, does not release from liability where insured was shot while resisting arrest or attempting to escape from an officer.—*American Mut. Benefit Ass'n v. Joshua*, Tex., 200 S. W. 260.

59. **Burglary.**—Under policy insuring against loss by burglary, theft, or larceny, mere disappearance of article is not sufficient evidence of larceny.—*Reed v. American Bonding Co.*, Neb., 166 N. W. 196.

60. **False Representation.**—Where applicant is fraudulently misled by agent as to contents of application in respect to false answer to material question, and is ignorant thereof, insurer cannot avoid policy on ground of false warranty as to answer.—*Travelers' Protective Ass'n of America v. Belote*, Ga., 94 S. E. 834.

61. **Fraud.**—Applicant's withholding of information that he had consulted a physician who diagnosed his case as myocarditis, and that he had consulted another physician a few months before his application, held to amount to fraud invalidating the policy.—*Whitney v. West Coast Life Ins. Co.*, Cal., 169 Pac. 997.

62. **Proofs of Death.**—Where insurer at first denied all liability, and when it later furnished blanks for proof of death, such proofs were made within reasonable time, recovery cannot be defeated on ground that proofs of death were not furnished within time stipulated by policy.—*Spencer v. National Life Ins. Co. of United States*, Mo., 200 S. W. 80.

63. **Suspension of Policy.**—Provision in policy of accident insurance, authorized by Gen. St. 1913, § 3524, that insurer's acceptance of delinquent premium should reinstate policy as to accidents thereafter sustained, is valid, and excludes liability for injury while policy is suspended by default.—*Ward v. Merchants' Life & Casualty Co.*, Minn., 166 N. W. 221.

64. **Waiver.**—Where insurer's agent acted in conveying insured property and requested an assignment to purchaser, and insured sent policy requesting agent to prepare assignment to purchaser, and agent approved assignment, and property was destroyed, held that insurer waived forfeiture incurred by sale of subject of insurance.—*Springfield Fire & Marine Ins. Co.*

v. E. B. Cockrell Holding Co., Okla., 169 Pac. 1060.

65. **Intoxicating Liquors—Jurisdiction.**—The county courts have jurisdiction to hear and determine controversies concerning money along with liquors, etc., seized by an officer under Rev. Laws 1910, § 3617, such money being an "appurtenance" within the statute, and "jurisdiction of the subject-matter" being the power to deal with the general subject involved in the action.—*Glacken v. Andrew*, Okla., 169 Pac. 1066.

66. **Police Power.**—State, in exercise of police power, may prohibit manufacture and sale of intoxicating and non-intoxicating beverages in counties voting to prohibit their sale under Const. art. 19; whether non-intoxicating beverages are deleterious or may be used to cover sale of intoxicating beverages being matters for legislative judgment.—*Fine v. Moran*, Fla., 77 So. 533.

67. **Landlord and Tenant—Permissive Use.**—Provision of lease that premises may be used for saloon, with statement how, if so used, saloon shall be conducted, creates a permissive, and not a restricted use, so that subsequent prohibition law does not defeat right to rent.—*Yesler Estate, Inc. v. Continental Distributing Co.*, Wash., 169 Pac. 967.

68. **Recoupment.**—Where a landlord fails to furnish stock according to his agreement, and tenant on shares thereafter raises crops, he is not relieved from payment of rent, but may recover or recoup the damages sustained by landlord's default.—*Seapy v. Smart*, Kan., 169 Pac. 1151.

69. **Libel and Slander—Exposure to Public Hatred.**—Charge that saloon keeper sold to minors or knowingly to their agents, held to expose him to public hatred, contempt, ridicule or financial injury, within act 27th Leg. c. 24, § 1.—*Koehler v. Dubose*, Tex., 200 S. W. 238.

70. **Malicious Prosecution—Evidence.**—Allegations that plaintiff had never been taken before any magistrate or court for hearing or trial on defendant's charge and had never been indicted, though grand jury terms of superior court had intervened, did not affirmatively show termination of prosecution.—*Garrison v. Foy & Adams Co.*, Ga., 94 S. E. 822.

71. **Marter and Servant—Course of Employment.**—Where plaintiff, while cleaning machine, which she operated, scratched her finger on wire protruding from side of it and which was partially hidden, injury was not an ordinary danger of employment of which she should have known.—*Chabot v. W. H. McElwain Co.*, N. H., 102 Atl. 758.

72. **Employer Defined.**—Where contractor had taken out workmen's compensation insurance, an owner is not liable to one of contractor's employees for injuries, under Workmen's Compensation Act (Laws 1911, p. 325), § 20, defining "employer," etc.—*Houlihan v. Sulzberger & Sons Co.*, Ill., 118 N. E. 429.

73. **Independent Contractor.**—A railroad company, being required under Rev. St. 1909, § 3150, to keep down the undergrowth along its right of way, is liable for injuries to persons caused by the negligence of an independent contractor in doing that work, and such contractor will be regarded as the servant or agent of the company.—*McGolderick v. Wabash Ry. Co.*, Mo., 200 S. W. 74.

74. **Injury by Third Person.**—Under Workmen's Compensation Act (Laws 1911, p. 316), § 3, abolishing damage actions, and § 17, authorizing damage actions against third parties, an employee may sue third party negligently injuring him, although receiving workmen's compensation from employer.—*Houlihan v. Sulzberger & Sons Co.*, Ill., 118 N. E. 429.

75. **Pleading and Practice.**—In suit against Texas Employers' Insurance Association under Texas Employers' Liability Act of 1913 (Vernon's Sayles' Ann. Clv. St. 1914, arts. 5246h-5246zzz) allegation in petition that notice of injury had been given employer and insurance association "in due time" was equivalent to allegation it was given "as soon as practicable," as required.—*Texas Employers' Ins. Ass'n v. Mumfey*, Tex., 200 S. W. 251.

76. **Report of Injury.**—Verbal report of injury to servant, made a day or two before his

death, to his foreman, proper person to receive it, satisfied Employers' Liability Act of 1913, pt. 2, § 4a (Vernon's Sayles' Ann. Civ. St. 1914, art. 524ppp), requiring notice "as soon as practicable."—Texas Employers' Ins. Ass'n v. Mumney, Tex., 200 S. W. 251.

77.—Safe Place to Work.—Where it was the duty of the master or his agent to remove any oil spilled on the top of the tank or tender of an engine, a servant could presume this had been done, and until he has been notified or acquired knowledge to the contrary, he does not assume the risk of slipping and falling from such cause.—Southern Pac. Co. v. Hazelbusch, Tex., 200 S. W. 268.

78.—Safety Appliance.—Under Employers' Liability Act and Safety Appliance Act, assumption of risk held not a defense if failure to have power brake of engine in working order contributed in whole or in part to the employee's death.—Union Pac. R. Co. v. Huxoll, U. S. S. C., 38 Sup. Ct. 187.

79.—Workmen's Compensation Act.—Under Workmen's Compensation Act, § 3, subd. 11, and § 16, and Domestic Relations Law, § 114, adopted child of employee's daughter held not entitled to compensation for his death.—Winkler v. New York Car Wheel Co., N. Y., 168 N. Y. S. 826.

80. **Mechanic's Lien**—Statutory Authority.—To authorize mechanic's lien, material must be furnished to one who has contract with owner of building or his agent, and it is not enough that material be furnished for or actually go into the building.—De Ranko v. Lee, Mo., 200 S. W. 79.

81. **Mortgages**—Junior Mortgage.—Where mortgagor took quit-claim deed from mortgagor's grantee in lieu of mortgage, and canceled mortgagor's note, but debt was not satisfied or mortgage released, position of junior mortgagee under mortgage from grantor in quit-claim deed was not bettered by cancellation of note.—James v. Williams, Kan., 169 Pac. 1183.

82.—Payment.—Where mortgagor conveyed one-third of his interest to his wife, free from mortgage, and mortgagee thereafter accepted deed from mortgagor by terms of which he was required to apply consideration to payment of mortgage, mortgage was discharged, and wife's interest not subject to satisfaction thereof.—Leary v. Clayton, Md., 102 Atl. 765.

83. **Municipal Corporations**—Automobile.—Where defendant in driving an automobile violated ordinances by turning to the left to enter an intersecting street before passing beyond its center, and though he saw plaintiff coming from the opposite direction when he had 34 feet in which to stop and could have stopped in 10, he failed to stop it within 44 feet and until after the collision, he was negligent.—Heryford v. Spitcaufsky, Mo., 200 S. W. 123.

84.—Streets and Highways.—Streets and highways are for use of all law-abiding people, and members of labor unions and strikers have no authority to intimidate or prevent persons from using them.—Niles-Bement-Pond Co. v. Iron Molders' Union, Local No. 68, U. S. D. C., 246 Fed. 850.

85. **Negligence**—Evidence.—Proof that judgment had been obtained against plaintiff's city for defective street conditions which defendant contractor was improving does not constitute circumstantial evidence that contractor's negligence caused accident.—City of Seattle v. Erickson, Wash., 169 Pac. 985.

86. **Principal and Agent**—Attorney and Client.—Power of attorney, authorizing attorney to execute a bail bond for third person in any sum required to be given, held to authorize execution of bond in any amount the court might see fit to fix the bail.—Mullins v. Commonwealth, Ky., 200 S. W. 9.

87. **Railroads**—Proximate Cause.—Where approach to train was rendered dangerous solely by negligence of another railroad in operating train on track passenger had to cross, first railroad was not liable for injury, second railroad being owner of depot and tracks.—Scott v. Cincinnati, N. O. & T. P. Ry. Co., Ky., 200 S. W. 6.

88.—Trespasser.—Where, due to stopping of a freight on a side track, so as to block a crossing for an unreasonable length of time, one

walked down the right of way to get around the train, he was a trespasser.—Sweat's Adm'r v. Louisville & N. R. Co., Ky., 200 S. W. 14.

89. **Street Railroads**—Negligence.—Failure of motorman to reduce speed of car approaching a crossing and to have it under control so as to avoid collision with auto truck in plain view at apparently safe distance, is negligence.—Peter-son v. New Orleans Ry. & Light Co., La., 77 So. 647.

90. **Telegraphs and Telephones**—Delivery of Message.—In damage action against telegraph company for failing to deliver message offering plaintiff a personal service contract, plaintiff's testimony that he would have accepted offer if message had been delivered is admissible.—Pfleister v. Western Union Telegraph Co., Ill., 118 N. E. 407.

91.—Unrepeated Message.—Stipulation on back of telegram that liability for error in sending unrepeat message was limited to amount paid for transmission will not relieve company from liability for losses occasioned by its negligence.—Warren-Godwin Lumber Co. v. Postal Telegraph-Cable Co., Miss., 77 So. 601.

92. **Theaters and Shows**—Administrative Tribunal.—Under Laws 1917, c. 308, Kansas board of review has full power to determine whether films offered for its examination and decision are proper for exhibition, and its determination is not open to review unless its action is fraudulent or beyond its jurisdiction.—Mid-West Photo-Play Corp. v. Miller, Kan., 169 Pac. 1154.

93. **Time**—Computation.—In computing the two-year period with which action to recover usurious interest paid must be brought under United States Usury Statutes, the first day of the period is excluded and the last day included.—First Nat. Bank v. Drew, Okla., 169 Pac. 1092.

94. **Trover and Conversion**—Evidence.—Where a cashier of a bank in his personal capacity negotiated an exchange of stock of the bank for another person holding stock of such bank, the bank was not a party thereto, and is not liable for conversion for issuing stock to an assignee of plaintiff's certificate of stock.—Harvey v. Bank of Marrowbone, Ky., 200 S. W. 28.

95. **Usury**—Evasion.—An agreement by the borrower to insure his property mortgaged to secure the loan does not constitute usury, unless the policy is taken out as a cloak or device to evade the statutes.—Matthews v. Georgia State Sav. Ass'n, Ark., 200 S. W. 130.

96. **Vendor and Purchaser**—Tender of Deed.—On tender of quit-claim deed on condition that it be accepted in satisfaction of bond to quiet title, which condition had no proper place in tender, yet as deed quieted title to all land which plaintiff could rightfully claim, it did not make tender void.—Snodgrass v. Snodgrass, Kan., 169 Pac. 1147.

97. **Waters and Water Courses**—Franchise.—A franchise contract, requiring water company to furnish water upon streets where its pipes were laid, and in such localities off same as citizens might conduct water to, does not require company to pay for piping between its mains and private property lines.—City of Indianapolis v. College Park Land Co., Ind., 118 N. E. 356.

98.—Pollution.—In action for damages to freehold from pollution of stream, exclusion of evidence of president of defendant company that, since construction and operation of fertilizer plant, the market value of plaintiff's land was enhanced, held not error.—Pelham Phosphate Co. v. Daniels, Ga., 94 S. E. 846.

99. **Will**—Codicil.—An instrument, duly signed and attested, reciting the making of a previous will disposing of all of an estate, and which had never been revoked, is a codicil, and sufficiently describes the will, provided the one executing it had previously made only one will.—Gulland v. Gulland, W. Va., 94 S. E. 943.

100.—Voluntary Transfer.—Son, stricken from father's will by codicil, to whom brothers and sisters gave share in father's estate, held not entitled, for fraud and inadequacy of consideration, to reconveyance of land conveyed by him to sister in trust for him, and by her, with him, conveyed to brother on same trust in settlement of his suit against sister.—Lewis v. Lewis, Ill., 118 N. E. 452.

Central Law Journal.

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TAKING CARE OF THE BUSINESS OF THE LAWYER WHO HAS GONE TO WAR.

Local bar associations are doing commendable work in urging lawyers who stay at home to take care of the business of lawyers who go to the front.

Reports from different sections of the country indicate that this idea is more than a patriotic sentiment. It has taken definite shape in many places. One bar association has written every member of the bar asking their consent to handle certain parts of the practice of enlisted and commissioned practitioners that may be assigned to them and to forward the entire fee to the client's former attorney and also pledging themselves not to accept any business from any such client after the return of his former attorney to regular practice.

This is idealism put into practice and is worthy of the greatest profession on earth. It reflects credit on the practice of the law and has confirmed the definite increase in the prestige of lawyers which followed upon the unselfish services rendered by the entire bar of the country to the young men eligible to draft in preparing their questionnaires.

Such splendid self sacrifice on the part of the lawyers of the army makes us feel like holding our heads a little higher and congratulating ourselves on the fact that the finer instincts of the profession we love are still actuating members of the bar and that virus of commercialism has not destroyed the higher ideals of the profession.

A. H. R.

RIGHT OF LABOR UNION TO PRESCRIBE MINIMUM NUMBER OF EMPLOYEES IN A BUSINESS OR ENTERPRISE.

In a Massachusetts case the question is propounded: "Is a combination between musicians a legal one by which a plaintiff is compelled to employ a number of musicians specified by the members of the combination, if he wishes to employ any member of the combination, even though it be the fact that in the plaintiff's opinion the employment of a single musician is the most advantageous way of conducting his business and that the employment of more than one musician will cause him pecuniary loss?" *Haverhill Strand Theater v. Gillen*, 118 N. E. 671, decided by Massachusetts Supreme Judicial Court.

The court in treating this question concedes that a labor union is a lawful combination and may resort to a strike to enforce lawful rules to accomplish its purposes. For example, the court had committed itself to the proposition that a labor union of masons had the right to strike to enforce its demands to secure the work of pointing mortar where members of the union had laid bricks for a building. *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638.

That case is described as one where "the defendants combined for the purpose of getting work which the employer wanted done," while in the case before the court, the union was seeking to force an employer to employ men for work he had no desire to have done, and when paying therefor would work a pecuniary loss. It asks whether the latter demand "is a justifiable interference with the plaintiff's right to a free flow of labor?"

The distinction stated appears quite narrow, but its consequences are said to be "far reaching." It is said that: "If it is legal for musicians to adopt a minimum rule fixing the number of musicians who shall be employed in all the theaters in its

jurisdiction, it is hard to see why a minimum rule may not be adopted by the allied trade unions of masons, carpenters and plumbers, fixing the number of stories of which every store to be erected in the business district is to consist, that is to say, masons, carpenters and plumbers may combine to refuse to work on any store less than ten stories in height even though the owner of land wishes to erect a store of two stories only, and even though the owner in his judgment cannot without pecuniary loss erect one having more than two stories." The court proceeds to give other illustrations of similar purport, in the effort to prove there could arise a virtual control by labor unions where wide activities need labor in their prosecution.

The court concludes that a majority of the court are of opinion that the minimum rule sought to be enforced was an interference with the right of employers to a free flow of labor not justified by the purpose for which the rule was made. The court rejects a Minnesota case to the contrary which case went upon the theory that what a man may do singly any number of men may do jointly, which it declares not to be the law in Massachusetts.

We think criticism of the principle in the Minnesota case is just, as appears lately to have been held by U. S. Supreme Court. *Hitchman Coal & Coke Co. v. Mitchell*, 38 Sup. Ct. 65. There it was said: "The right of employees to strike would not give defendants the right to instigate a strike. The difference is fundamental."

Neither does the fact that carrying on a strike is peaceable make it, as matter of law, lawful, as the *Mitchell* case also holds.

It seems to be a question of a degree how far rules adopted by a lawful combination, as is a labor union, may be enforced. If they have the necessary effect to violate legal rights of others, as if their tendency is to create an unlawful monopoly, a combination, however lawful which may be in the protection of a labor union's right to

advance its own interests, may be, it will be held to be the employment of means to an unlawful end. Police power protecting such a rule would seem quite one-sided in its application and the struggle for private advantage would become ruthless in its disregard of ordinary rights and privileges.

NOTES OF IMPORTANT DECISIONS.

MUNICIPAL CORPORATIONS — ORDINANCE FIXING RATES FOR PUBLIC UTILITY NOT CONTRACT FREE FROM IMPAIRMENT.—In *Collingwood Sewerage Co. v. Borough of Collingswood*, 102 Atl. 901, decided by Supreme Court of New Jersey, it was held that where an incorporating act for a public utility provided for a borough granting a consent ordinance fixing maximum and minimum rates for service, this ordinance and its acceptance did not create a contract for rates within those limits so as to be free from impairment of contract obligation, and therefore rate fixing for the utility came under the control of the state's Public Utility Commission.

The court said: "The ordinance was the legislative act of the municipality. As a legislative act, it was subject to the control of the legislature itself, and that body could make changes as long as it did not infringe the rights of the sewerage company, arising under the ordinance. It makes little difference whether we say that the ordinance created by way of legislative grant a property right called a franchise, protected by the Fourteenth Amendment, or a contract protected by the contract clause of the Federal Constitution and under our state constitution. In either case, the question is whether a municipal corporation, an agency of the state, is protected by either the Fourteenth Amendment or the contract clause. It is well settled that such protection does not extend to the rights of the municipal corporation against its own creator."

This principle being settled, as said, the court spoke of such an ordinance as being "a grant upon condition rather than a contract. It creates public duties which can be enforced by mandamus." Being such there was held to be no reason "why the legislature may not clothe a public service commission," with the power it had formerly reposed in the municipality. For discussion of this subject see

Collier on Public Service Companies, 1918, §§ 91, 92.

The instant case was later confirmed by Supreme Court of New Jersey in Northampton, E. & W. T. Co. v. Board of P. U. Comrs., 102 Atl. 930, where consent of Public Utility Commission was sought by a street railway company to increase its fares and resistance was interposed on the ground that there was an irrepealable contract in favor of the municipalities through which the railway ran. The order of the commissioners refusing to entertain the application was set aside.

BENEFIT SOCIETY—CLAUSE FOR COMPENSATION FOR INJURY ACCORDING TO SYSTEMATIC BENEVOLENCE OF SOCIETY.—In Miller v. Grand Lodge, Brotherhood Railroad Trainmen, 118 N. E. 713, decided by Supreme Court of Illinois, it is held that where one section of the constitution and by-laws of a fraternal association provided for recovery for enumerated injuries and for other injuries another section provided that application is to be addressed to the systematic benevolence of the association through its beneficiary board, but in no event shall claim therefor "be made the basis of any legal liability" of the association, this other section was held contrary to public policy, as giving to one party to a contract to be both "judge and arbitrator of its own case." Therefore a suit for other injuries was cognizable by the courts, and an award for compensation was affirmed.

The court concedes that the former section, if it stood alone, would have precluded any recovery, but it strongly inveighs against the other as providing for charity in satisfying a legal right. All through the contract of insurance is admitted to be governed, not solely by the policy or benefit certificate, but by the constitution and by-laws.

But what are a constitution and by-laws of a society of this sort? And what powers has a corporate organization governed by such constitution and by-laws? Plainly it seems to us it has no real contractual existence, so far as agreements with members are concerned. Members so understand when they put limitations on the corporation in its right to contract with them. If two individuals make a contract by which in a certain event one is to become liable to the other for specified injury, and for injury suffered otherwise, the latter may give him anything or nothing as he may out of sympathy see fit, why is not such a contract lawful? If it is, why may not an aggregation

of individuals, speaking by its solemn agreement, provide for the same thing? Certainly one joining an order either before or after such a provision is made, accepts or enters into a contract as between individuals.

It does not seem precisely right to take away from a corporation all right to contract outside of certain limitations and then hold it as if it were clothed with a general right of contract.

CORPORATIONS—RIGHT OF ONE ALSO STOCKHOLDER IN RIVAL CONCERN, TO INVESTIGATE BOOKS.—In Furst v. W. T. Raleigh Medical Co., 118 N. E. 763, decided by Supreme Court of Illinois, it is held that the fact that a stockholder is also a holder of stock in a competing corporation and displays a hostile attitude to it and by examination into its books may obtain information of benefit to the competing company, does not deprive him of his statutory right to examine its books.

It appears that the statutory right conferred is as to records and books of account kept at its principal office, but it was alleged by the corporation, that the exercise of the right granted by statute would enable the applicant to discover its customers and to obtain knowledge of its secret processes in compounding medicines. The examination sought by him was ordered by the Appellate Court so as to exempt from its operation salesmen's registers and formulas and secret processes, and this ruling on further appeal by the corporation was affirmed.

This restriction of the order for examination seems entirely just, but should it appear that the examination would lead to disclosure of "secret formulas and business matters," further hope is held out for application for relief.

While the court appears to have correctly ruled this case, it yet appears that there may be a serious handicap in the conduct of corporate business beyond what might exist as to a partnership or individually owned business. If stockholders in their entirety own a business, in ultimate aspect, they are entitled to know all about it, its list of customers, its methods of doing business, its formulas, secret or open, just as much as are its directors or managers. But is the fact, that stock may be sold on the open market or come into ownership of others by descent or distribution an implied limitation on their rights as ultimate owners?

It is well settled in law, that the owner of a business has rights in legitimate secrecy and

to keep for his own advantage that which he has built up in the course of business. If he has to expose these things to others they may lose greatly their value, or even be made valueless. What restriction, if any, may be placed on stockholders, prying into this secrecy? Is there not a limitation on rights of ultimate ownership in the fact that it is ultimate and that as long as a corporation is a going concern, the methods and processes it uses belong rather to the corporation as such? This must be true, or action by one of the ultimate owners might be taken regardless of its injury to other ultimate owners.

This statute was, we think, properly regarded by the Illinois courts, which seemed to confine the exercise of the right granted to narrow terms.

RECALL OF JUDGES AND IMPEACHMENT.

In the Central Law Journal of December 14, 1917, is an interesting article by Mr. Albert M. Kales, relating to the selection of judges, which deserves some attention. To a practicing attorney it has often been mortifying to observe that a judge, who is honest and capable, and who renders excellent service between ordinary litigants, fails in moral courage when some public question affecting a large number of the electorate comes before him. Nearly everyone has had such experience, especially where the judge has to submit to a popular vote every few years in order to continue in office.

One does not feel like condemning the judge for his lack of moral stamina, for we realize that it is the system, which, like conscience "does make cowards of us all."

Mr. Kales asserts "that there is practically no such thing as the selection of judges by the people." It is difficult to perceive the correctness of this statement. Every state has its peculiar system, such as appointment by the executive, or by the legislature; but, when the people make their

choice directly at the polls, it surely comes close to electing judges by direct ballot.

As an illustration, take the state of Washington; any attorney of record may become a candidate for a judicial office by filing a declaration of candidacy with the proper officer at least thirty days before the primary election, and paying into the public treasury a fee equal to one per cent of the annual salary. For instance a candidate for Superior Court Judge in Seattle would pay \$40.00, while an aspirant for Supreme Court honors is required to deposit \$60.00.¹ The name of everyone who has filed as provided by law appears on the primary ballot, and all have an even chance. If there are four offices to be filled, and there should be ten candidates, then only the names of the eight candidates having the highest number of votes will appear upon the general election ballot; however, if any judicial candidate receives a majority of all the primary votes cast, then his name is printed "separately on the general election ballot," and no name is placed opposite his, only a blank space is left for a name to be written in. That is, the candidate having a majority of all the votes cast at the primary is virtually elected, although his name must appear upon the official ballot for the general election. If this is not an election of judges by direct vote of the people, what is it? Known as the "Non-partisan Judiciary Election," this scheme has worked fairly well. In fact, the electors as a rule have been discriminating and careful in voting for judges. At any rate a person notoriously incompetent or unfit for a judicial office would have but a slim chance, especially if the bar should voice a strong and determined opposition to such a candidate.

Some candidates have not scrupled to resort to advertising their peculiar fitness and merits. One ambitious attorney wanted to be judge upon the ground, that if elected, he would "enforce the laws of God and

(1) Sec. 4808-4892 Remington's 1915 Code.

man without fear or favor." Presumably, he was under the impression that it would be his duty to administer ecclesiastical law as well as the common, and statute law. Another offered "to give a poor man an equal chance with the rich man." It is to the credit of the voters that these specious appeals met with well deserved rebuke.

Members of the bar often refer to the federal system of appointment as the acme of perfection. This plan has been quite successful, but it is far from ideal. It is a notorious fact that the people generally distrust the disinterestedness of lawyers; they have no confidence in any altruism of the bar. The English method of appointing judges has been abandoned in this country where the public have had their way. An elective judiciary is what the people want under the prevailing system, and as they have to pay the bill and suffer the consequences, they are entitled to get what they want. There would be less objection to appointed judges if there were a reasonably speedy and inexpensive method to get rid of an incompetent or inefficient judge; but the prevailing practice of impeachment by a legislature or by Congress is impracticable and archaic; what is worse, it is wholly discredited by the public. Because of this, generally speaking, the popular demand is for the election of judges.

However, a plan that would be likely to meet with general approval and eliminate much criticism and distrust of our judiciary, and that is evidently superior to the existing system, would be something on the following order:

Judges should be elected by popular vote for an arbitrary term—say, four years. If he is directly re-elected to the same office, he should then hold during life, or until he resigns or is removed. Four years' service should be long enough for a test of competency and fitness for judicial work. The vice of the elective system is, that judges have to bear continually in mind that they must submit to periodic elections with their

incidental expense and distraction from work. Having demonstrated his competency and fitness, if the voters honor him with a re-election, that should place him permanently on the bench. This would almost entirely eliminate political trimming and favoritism, and dispense with "playing politics" while in office.

To illustrate this point: One is reminded of a story told by Daniel Webster. Jeremiah Mason, his great rival at the bar, objected to a candidate for a judgeship. Webster wanted to know the reason; Mason answered: "If that man were elected he would have to do double work—first, to determine the right of the case according to law; second, to make up his mind which way the case should be decided according to politics."

The electors would be satisfied with the proposed scheme if there were a remedy available to every citizen by which the judicial incumbent could be speedily ousted from office in the event that he should neglect his duties, fail mentally or physically, or be guilty of some act impairing his usefulness, or that would cause his integrity to be suspected.

Impeachment of a federal judge is a slow process, enormously expensive and is finally to be determined by partisan votes, irrespective of the legal aspects or merits of the charges. The Hayes-Tilden Electoral Commission, although composed of judges who wore the ermine unstilled, is a fair illustration of how politics influences non-judicial bodies. This commission decided for Hayes by a strictly partisan vote.²

In a western state some years ago a judge was required to answer to charges of improper official conduct. Impeachment proceedings failed, not because he was deemed innocent, but because sufficient votes had been purchased at \$500.00 each to obtain a majority in his favor.

The objection to the federal system is mostly based on the fact that it is well-nigh

(2) Decisive Battles of the Law 224.

impossible to dispense with the services of a judge who is naturally not adapted for the office, or who by reason of some act or infirmity of mind or body becomes unfit for service on the bench. If he will not resign he can be removed only "on impeachment for, and conviction of treason, bribery, or other high crimes or misdemeanors."³ There have been occasions when judges have held office long after their infirmities unfitted them for their duties, but as "few die and none resign," there was no relief until a kind Providence came to the rescue. They had not committed a crime by growing old in service, nor by suffering decay of their faculties; therefore, they had a right to stay *ad libitum*.

When the Constitution was adopted this was urged as an objection. Hamilton, usually clear and forcible, answered feebly, saying: "All considerate men will be sensible that such a provision would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose."⁴

The several states have usually adopted or followed the federal procedure of impeachment, and so it has become established as an essential part of our political system, but it does not follow because it is ancient that nothing better can be devised or substituted. Anyone who does not admit unqualified perfection is, of course, by some regarded as an iconoclast or worse. That the Constitution is not perfect is conclusively shown by the numerous amendments, and the probability that the next few years will witness several more, and perhaps extremely radical changes.

Fancy a lawyer of the old, strict, construction school dreaming a third of a century ago about extending the Constitution to unheard of dimensions, his dream would in reality now be outdone by the scope and extension of powers which the federal gov-

ernment has assumed as a right without question.

It is almost incredible that Matthew H. Carpenter, the greatest constitutional lawyer of his day, should have asked this question of Senator Windom in the United States Senate in 1879: "Is there a lawyer in the Senate who can point out what clause of the Constitution affords power to establish a Department of Commerce and Agriculture?"⁵

In the study of comparative jurisprudence in relation to the judiciary, the proposed scheme recommends itself in place of impeachment and is far superior to it, because of simplicity and directness; the proceedings would be before a judicial body and not before a congregation of politicians unadapted for such duties. The expense would be comparatively small, action would be speedy and not delayed as in the case where the legislatures meet only biennially.

The direct, simple and effective method to be substituted would be a Court of Impeachment, called into existence by order of the executive whenever charges requiring investigation against any judicial officer may be presented to him. The President or Governor would submit such charges to the Chief Justice and direct him to hold a special court, and designate, for instance, two additional Supreme Court judges and four judges from the inferior courts to serve with him. This high tribunal of seven would hear and determine the charges preferred, and should have unlimited power to remove, suspend or discipline or do whatever they might deem advisable. They should also have authority to grant a pension to the judge removed not exceeding two-thirds the salary of his office. When the cause is determined this special tribunal would cease to exist and pass from memory as a jury.

This method prevails in some countries and has proven satisfactory in practice. If a similar plan were adopted in lieu of our

(3) Sec. 4. Art. 11 Constitution.

(4) The Federalist, LXXIX.

(5) Flower's Life of Carpenter, p. 429.

present impeachment, it would be of little concern to the public whether the judiciary were elected or appointed. In the eighteenth century judges were mostly appointed; but the newer states have always adopted election by popular vote. Had there been provided a certain, simple, convenient, inexpensive way to remove and supersede judges when they became unfit or incompetent for service on the bench, without proving them to be criminals, it is likely that judges would generally be appointed by the executive instead of being elected by popular vote as an ordinary politician.

It, therefore, follows: that it is not of as much importance how men attain to a judicial office, as it is for the people to have the power to discipline, suspend or remove from office any incumbent who becomes unfit, unworthy or incompetent by reason of neglect of duty, age, infirmity or through malfeasance or misfeasance, to hold the high, dignified and distinguished office of judge.

The movement for the recall of judges is largely based on dissatisfaction with the present system of impeachment. The American Bar Association appointed a committee for the purpose of opposing judicial recall and the recall of judges. It seems strange that this distinguished body of lawyers should have acted injudiciously in disposing of this very important question. The committee was to oppose and defeat the demand for recall in all its phases; apparently, it was taken for granted that there was no other side to this proposition and that there could be no possible remedy devised to remove existing evils or to satisfy the reasons advanced for a recall.⁶

This point is made clear by Ostrogorski, the eminent historian on Democracy, thus: "Resistance to an idea, pure and simple, is never a force in itself; to proclaim one's hostility to an idea, without being able to meet it on equal terms, only gives it a fresh stimulus."

(6) Report of American Bar Association for 1913, p. 62.

Surely, it would have been more logical to have ascertained why there was a popular demand for recall and to have endeavored to remove the cause, than to suppress the recall movement arbitrarily. The writer is opposed to the recall of judges and, generally speaking, the entire bar is opposed to it; but like Banquo's ghost it will not down, and probably will trouble us again when normal conditions are restored.

FRED H. PETERSON.

Seattle, Wash.

LIFE INSURANCE FOR THE BENEFIT OF WIFE OR CHILDREN—CASE OF ARNOLD v. DOMINION TRUST COMPANY.

The general rule in the United States is that a policy of insurance on the husband's life in favor of the wife becomes her separate property, and statutes have been passed in various states regulating this matter.

In Canada the same matter has been dealt with, and acts have been passed by the different provinces for the purpose, as expressed in these acts, of "securing to wives and children the benefit of life insurance." Cases arising under these acts have been before the Canadian courts on several occasions, especially in the Province of Ontario, and the rules laid down by the courts will repay a careful perusal by American readers who may be interested in the subject.

The general effect of these Canadian acts is that any person may not only insure his life for the benefit of wife or children, but that, after a policy has been placed which is not for their benefit, he may, by any writing identifying the insurance policy by its number or otherwise, declare and provide that the policy shall be a trust for the benefit of wife or children, free from the control of his creditors.

One of the first questions which the Canadian courts were called on to decide was this—if a person has a life insurance policy, and by a will, bequeaths the proceeds of the policy to a wife or children, is the will a “writing” within the meaning of the law?

This point has been before the Ontario courts in three or four cases, in all of which it has been decided that such a declaration may be made by a will.

As to what is a sufficient “identification” of the policy “by number or otherwise,” there has been more uncertainty, but in one Ontario case it was held that where a party bequeaths the proceeds “of all life insurance policies” to the wife or children, or where he makes certain bequests and then bequeaths the residue of his estate, “including life insurance,” to wife or children, it is a sufficient “identification” of the policy to comply with the terms of the law.

In another Ontario case a party made a will bequeathing the sum of \$1,000 “to be paid out of the insurance money on my life at my decease,” and there was only one policy of insurance on his life, either at the time the will was made or thereafter, and the question was whether this was a sufficient identification of the policy. The Ontario court held that it was.

“The wording here is certainly very general,” said the judge who decided the case: “but, the fact being admitted that the policy in question existed at the time, and was the only policy of insurance upon the life of the deceased, either then or subsequent thereto, until his death, there can be no doubt, I think, that the testator, at all events referred to the policy in question, and, having regard to the facts that there could be no question as to what policy he did refer to.”

Probably the most important case along this line, decided by the Canadian courts however, is the case of *Arnold v. Dominion Trust Company*, recently passed upon by the British Columbian courts, the case hav-

ing arisen out of a rather peculiar state of facts, and a peculiarly worded will, and the amount of money involved being somewhat large.

The case in question arose out of the operations of the Dominion Trust Company, and the death of W. R. Arnold, the manager. Arnold carried a very heavy insurance—in fact, over \$200,000 of insurance money was collected, while some of the companies resisted payment. Before his death Arnold made a will in the words and figures following:

“The first \$75,000 collected on account of policies of life insurance I give to my wife,” with other provisions in reference to disposal of the funds.

The British Columbia act relating to the matter is as follows:

In case a policy of insurance effected by a man on his life is expressed upon the face of it to be for the benefit of his wife, or of his wife and children, or any of them, or in case he has heretofore indorsed, or may hereafter indorse, or by any writing identifying the policy by its number or otherwise has made, or may hereafter make, a declaration that the policy is for the benefit of his wife, or his wife and children, or any of them, such policy shall inure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the intent so expressed or declared; and so long as any object of the trust remains, the money payable under the policy shall not be subject to the control of the husband or his creditors, or form part of his estate when the sum secured by the policy becomes payable.

The question then was whether the will bequeathing the insurance money to the wife was “any writing” within the meaning of the act, and on this point the British Columbia court followed the Ontario decisions to the same effect.

Then this question was whether the will in question was a writing “identifying the policy by its number or otherwise,” and the point was one of “first impression,” as the lawyers say, as no case was exactly in point.

The judge who tried the case decided against the claim of the wife, on the ground that where there are several policies for a total amount exceeding the sum named in the will, a bequest of a certain smaller sum to be paid out of life insurance generally is not a sufficient "identification" of the policies.

In deciding the case the judge made the following general observations in reference to the insurance acts:

"The act was passed as a remedial measure and of assistance in effecting one of the principal benefits of life insurance. It was intended, notwithstanding the terms of the contract with the insurance company, that the assured could of his own volition vary the same and make provision for his dependents in case of death. It is limited in its operation to his wife and children. I think, under such circumstances, that the act should receive 'such fair, large and liberal construction and interpretation as will best insure the attainment of its object.' No decision has been cited to me on the point, in which the facts are on all fours with those presented in this case."

Notwithstanding the foregoing, the decision was against the widow, the judge relying strongly on an Ontario case, where the court refused to uphold a will bequeathing to a wife one of four policies (all of a similar description) without any further reference to any particular policy. In that case the Ontario judge had said:

"I should go far beyond any decision yet pronounced in favor of preferred beneficiaries upon the question of identification under the statute. In my opinion it is not possible to maintain that a bequest of one of four policies, any one of which may be selected to answer a bequest, is such a designation as meets the requirements of the statute—that the policy shall be identified by number or otherwise."

"It is admitted," concluded the British Columbia judge in the Arnold case, "that W. R. Arnold had a number of policies in force at the time when he made his will. The face of such policies exceeded \$75,000 and it is thus doubtful, out of which policies he expected or intended such amount to be

paid. It is thus contended that even if a will can by apt terms operate so as to comply with the act that the language of the will in question falls short of the identification contemplated and intended by the statute. He could easily have identified a particular policy in the will. He did not do so, however. Can the wife and children under the terms of the will obtain the benefit of the act without some such compliance? I think that while the intention of Arnold to appropriate the proceeds of insurance is quite clear, still, this is not sufficient; I should not, as a court of first instance, hold that the policies have been properly identified so as to comply with the statute. If I decided otherwise, I feel that I would be going farther than the decisions warrant. It was uncertain at the time when the will was made, or when Mrs. Arnold was informed as to the provisions of the will, as to what policy or policies would afford the moneys to pay the \$75,000. This is still unascertained. There is not the 'clear, sure and certain identification which seems to be imperative, having regard to the repeated and particular expressions of the Insurance Act.'

"It is to be regretted that Arnold did not implement his intention of providing for his dependents out of his life insurance—in a legal manner. In my opinion, the statute permitting this course to be pursued for the benefit of wives and children has not been complied with. The moneys collected from the life insurance policies are not available for payment of the \$75,000."

The case was appealed to the British Columbia Court of Appeal, and two judges held that the judge below was right; while two judges decided that the will was sufficient and that the widow was entitled to the \$75,000 fund.

"To illustrate the point," said one of the judges who upheld the will, "if at the time of the present declaration in the will there were ten policies in existence, but all had since lapsed save one, there could then be no doubt about the identification whatever

—it would be a certainty. And if two only remained for \$50,000 each, there would still be a certainty for both would have to be resorted to in order to complete the trust. So, in my opinion, there can be no real lack of identification where all are made liable to a contribution, wholly or in part, from which liability they may be freed by payments from one or more of the whole group charged. In such case there is from the outset the certainty that all are liable and none is discharged till payment of the whole specified amount is made to the beneficiary. Again, by illustration—if the insured had four policies in four different companies for \$5,000, \$10,000, \$15,000 and \$1,000 respectively, they could be jointly charged for a whole sum of \$25,000 just as effectually as they could be severally charged for a part thereof. And it is easy to imagine circumstances in which a careful and prudent policyholder would seek to guard against any failure of the intended trust by making a joint charge of \$20,000 upon four policies aggregating \$50,000, instead of a several charge of \$5,000 upon each of them: as time goes by he may have reason to doubt the financial standing of one or more of them; or the forfeiture, or non-contestable, or other clauses might not be so favorable in all; or he might wish to guard against the consequence of any oversight in payment of premiums; or delay in payment by any company which might for a special reason wish to contest payment, thereby causing expensive litigation as well as postponement of the intended benefit, which is almost invariably urgently needed. Therefore, I am of the opinion that the court should hesitate long before depriving his widow and children of the result of his foresight and business acumen in minimizing and distributing the risk of any failure of the intended trust by making a joint instead of a several charge. There is absolutely no distinction in principle and cases ought to be decided upon principle and not upon attempts to change principles

to meet new and ever varying facts. I regard the words here employed—'the first \$75,000 collected on account of policies of life insurance'—as equivalent to 'all my policies of life insurance,' for the testator was unquestionably speaking of his own insurance, and 'my policies' mean 'all my policies,' just as 'my goods and chattels' means 'all my goods and chattels,' unless further words of limitation are employed."

The following quotations from the judgment of the other judge will also repay a careful perusal:

"Turning to the precise matter we have for decision, it appears to me to be simple in the extreme. All the insurance of the testator is dealt with in the declaration as contained in the will; the fund is identified; the policies are all the policies upon the life of the testator that are dealt with in the writing. Is it difficult to identify or find these policies? It is highly unreasonable to so construe the statute law as to render it nugatory, void and of no effect, and ask for the number of the policies or other particular identification when the declaration, in its effect, covers all policies; that a portion of the moneys only are to go to the wife matters not, the whole might have been given, but, save as to the \$75,000, the creditors of the estate are entitled to the moneys. When it is considered that it was the plain intention of the legislature to make provision, whereby the husband could, even as against his creditors, protect his wife and children from penury, it would be frittering away the benefit intended, to so construe the statute law as to render it almost impossible under certain conditions to obtain the benefit clearly intended by the legislature. It is not difficult to call into mind situations and circumstances when the husband would be unable to have the policies at hand, or would know the numbers thereof, or even remember the names of the companies; and can it for a moment be considered that the intention of the legislature was that the language used should in such a case, without this information available, render it impossible for the husband to comply with the statute? The answer must be, that the spirit and intention of the legislature was to enable the husband to make the declaration in any reasonable and rational way, and the language is 'by writing identifying the policy by its number or

otherwise has made or may hereafter make a declaration that the policy is for the benefit of his wife or of his wife and children."

The court being equally divided—two and two—Judge Macdonald's judgment against the widow was sustained, so that the decision will be good law in Canada, unless the case is carried to the Supreme Court of Canada and reversed on appeal.

M. L. HAYWARD.

Hartland, N. B., Canada.

BILLS AND NOTES—NEGOTIABILITY.

FIRST NAT. BANK OF SIDNEY v. GREENLEE.

166 N. W. 560.

Supreme Court of Nebraska. Feb. 16, 1918.

Where a promissory note contains the printed words "pay to the order of" immediately before the name of the payee, and the written word "only" immediately after the name of the payee, held, the written word "only" prevails over the printed words "pay to the order of," and such note is non-negotiable.

MORRISSEY, C. J. Plaintiff brought this action on a promissory note and recovered a judgment against appellant Greenlee as maker, and against defendant Closman as indorser. Greenlee appeals.

The petition alleges that, December 12, 1912, Closman executed and delivered to plaintiff his promissory note for the sum of \$1,000, and, as collateral security therefor, indorsed and delivered the note in suit to plaintiff; that the Closman note and the note in suit were both due and unpaid. Judgment was entered against Closman by default. Defendant Greenlee answered, admitting the execution and delivery of the note by him to Closman, and alleged in substance that the note was nonnegotiable and that the consideration therefor had failed. The answer contains a number of allegations calculated to show the transaction between Greenlee and Closman, but their recital is unnecessary for a determination of this case. A jury was waived, and the cause tried to the court.

Defendant offered to introduce evidence to show the agreement between the maker and

the payee of the note and their understanding of the paper. This evidence was excluded, and the rulings of the court are assigned as error. As the controlling question is the negotiability of the paper as it appears on its face, it is unnecessary to discuss rulings on the admission or exclusion of evidence. The note was written on a standard printed form and reads as follows:

"1,000.00. Sidney, Nebr., Dec. 9th, 1912.

"One year after date I promise to pay to the order of L. F. Closman only one thousand & no/100 dollars at Sidney, Nebr., with interest at eight per cent. per annum from date. Value received.

A. K. Greenlee."

The date line is written with a pen; the words "one year" and the personal pronoun "I" are written, in the second line, with a pen; "L. F. Closman only," on the third line, is written with a pen; "one thousand and no/100," in the fourth line, is written with a pen; "Sidney, Nebr., with interest at eight per cent. per annum from date," is written with a pen, as is also the signature "A. K. Greenlee." All other parts are printed, including the words "pay to the order of."

There is an apparent conflict between the printed words "pay to the order of," preceding the name of the payee, and the written word "only," following the name of the payee. Section 5335, Revised Statutes of 1913, provides:

"Where there is a conflict between the written and printed provisions of the instrument, the written provisions prevail."

To give full effect to this provision of the statute, the word "only," written with a pen, must be held to prevail over the printed words "pay to the order of." The negotiability of the instrument was restricted by the written word "only," and the plaintiff took the note subject to any defense the maker might have if it were in the hands of the original payee.

Appellant claims that under the pleadings and proof the judgment ought to be reversed and dismissed. We do not care to go so far as this. The negotiability of the note was somewhat clouded by the form of answer filed, and was not presented to the trial court, either by the answer or by the motion for a new trial, in the clear and concise language the question might have been presented. The answer may have misled the trial court, as well as attorneys for the plaintiff, and the admissions in the reply on which appellant now relies for a dismissal of the case may have been inserted because of the peculiar form of

the answer. The indorsement and delivery of the note by Closman to plaintiff constituted an assignment thereof to plaintiff. As to appellant Greenlee the judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

LETTON, J. (concurring). Without reference to the point discussed in the opinion, in my judgment, the note is nonnegotiable on its face.

ROSE and SEDGWICK, JJ., not participating.

HAMER, J. (dissenting). The note about which the controversy arose is made payable "to the order of L. F. Closman only." As the note is written, it appears to me to be a negotiable instrument. The insertion of the word "only" did not, so far as I can see, change the character of the instrument, so that it became nonnegotiable. When the officer of the bank looked at it, he would see that it permitted Closman to indorse it. Whether the note read "to pay to the order of L. F. Closman only," or read "to pay to the order or L. F. Closman," made no difference. In any event, Closman could indorse the note, and thereby transfer it. I am not prepared to say that the writing of the word "only" might not have attracted the attention of the officer of the bank who received it, but I most strenuously insist that a note payable to the order of any payee named in the instrument is transferable only by the indorsement of such payee.

Section 5348, Rev. St. 1913, provides the qualities which make an instrument negotiable. The first sentence of the section reads:

"An instrument is negotiable when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof."

No good reason is given why this note may not be transferred from one person to another, so as to constitute the transferee the holder. The closing sentence in the section reads:

"If payable to order it is negotiable by the indorsement of the holder completed by delivery."

It was "payable to order." It was indorsed by the holder, and the title to the bank appears to have been made complete "by delivery." It is difficult for me to understand why we should shut our eyes to the fact that the note was made "payable to order." Putting the word "only" in the note did not take away the words "payable to order." Only the payee of the note could properly indorse it. Calling him by name would not seem to have made any change in the intention of the maker.

Note.—Restrictive Words Destroying Negotiability.—The prevailing opinion in the instant case puts the question of negotiability on a fact of no importance or at least of very little importance. It assumes opposition between printed and written words and then holds that the written words restrain negotiability. The dissent appears not particularly to care whether the instrument was wholly written or wholly printed and construes it according to its alleged obvious meaning. If there were irreconcilable conflict in the words, so as to bring about an ambiguity, we think it might be said it would put a proposed purchaser on inquiry. We can only hope to cite analogous cases.

The general rule is that "courts are careful to guard the interests of commerce by protecting the negotiation of commercial paper." And "they are careful to guard against fraud" where there is bad faith or with knowledge actual or imputed, which amounts to bad faith, when regarded from a commercial standpoint." Ward v. City Trust Co., 192 N. Y. 61, 72, 84 N. E. 585. This states the rule, that whatever is on the face of a bill or check does not prevent negotiability unless it creates a well-defined suspicion that calls for investigation.

It is said that this rule at common law is strongly enforced in Negotiable Instruments Law. There must be "actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounts to bad faith."

"Mere ground of suspicion as to possible defects in the title of the negotiator, or of the existence of defenses to the instrument negotiated, is not the equivalent of notice to the transferee, and, to be regarded as an innocent purchaser, he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though, if the negligence be of a marked or gross character, it may be competent to establish the *mala fides* of the purchase." Arnd v. Aylesworth, 145 Iowa, 185, 123 N. W. 1000, 29 L. R. A. (N. S.) 638.

Where a check is postdated this has been held not sufficient to put one on inquiry. Mayer v. Mode, 14 Hun. 155. Nor where a check was made at St. Paul, Minn., and cashed five days later at Denver, Colo. Estes v. Lovering Shoe Co., 59 Minn. 504, 61 N. W. 674, 50 Am. St. Rep. 424. Where a note had no stamp on it as required by law this has been held not to put purchaser on inquiry. Ebert v. Gitt, 95 Md. 186, 52 Atl. 900. Where there was variation in numerals and words as to amount of note are said to be not infrequent and give rise to no reason for inquiry. Central Nat. Bank v. Pipkin, 66 Mo. App. 592. The erasing of an indorsement on the back of a certificate of deposit gave no reason for inquiry, because an indorser in lawful possession may erase all indorsements to him. Bank of Montreal v. Dewar, 6 Ill. App. 294.

Where the word "renewal" was erased, an instruction that "if there was any mark of 'renewal' the plaintiff was put on inquiry," was held erroneous. Hall v. Hale, 8 Conn. 336.

"Without recourse" indorsed on a note presents no occasion for inquiry. Stevenson v. O'Neal, 71 Ill. 314; Kelley v. Whitney, 45 Wis. 110, 30 Am. Rep. 697. And where "without recourse"

had been erased, and the indorsement left unconditional, this was insufficient to put a purchaser on inquiry. *Collins v. McDowell*, 65 Minn. 110, 67 N. W. 845.

In *Richards v. Monroe*, 85 Iowa 359, 52 N. W. 339, 39 Am. St. Rep. 301, it was declared not to be the rule in Iowa that a purchaser of a negotiable promissory note for value is not upon inquiry where he has such knowledge or information of infirmities as would put a man of ordinary prudence upon inquiry. Putting him on suspicion is not sufficient. "He must be shown by direct or circumstantial evidence" to have taken with actual knowledge or that there was wilful neglect to inquire. *Lehman v. Press*, 106 Iowa 389, 76 N. W. 818.

Mere suspicion that a note is without consideration will not defeat recovery by holder. There must be bad faith. *Borgess Invest. Co. v. Vette*, 142 Mo. 560, 44 S. W. 754, 64 Am. St. Rep. 567. Bad faith is the rule in Nebraska also. *First State Bank v. Borchers*, 83 Neb. 530, 120 N. W. 142.

Where a note is payable "to the order of Lew W. Cochran or R. F. Dygert" is negotiable upon indorser of the one of the two having it in his possession, where there is no bad faith. *Voris v. Schoonover*, 91 Kan. 530, 138 Pac. 607, 50 L. R. A. (N. S.) 1097.

A premium note payable to an insurance company or their treasurer is a good note and action may be maintained by the company. *Atlantic M. F. Ins. Co. v. Young*, 38 N. H. 451, 75 Am. Dec. 200.

In *Watson v. Evans*, 1 Hurlst. etc., 662, 32 L. J. Exch. N. S. 137, a note payable to A, B and C or their order or the major part of them may be sued on by all of them.

These cases show the general theory of cases where there are irregularities or departures from ordinary phraseology in negotiable paper. Commercial usage will not permit a signer of a paper presumptively intended for transfer, in a way whereby innocent purchasers may be defrauded, without putting upon him the onus of answering for his own negligence, unless the irregularity suggests plainly some infirmity. It would be too plain for argument that were the paper in the instant case, wholly written, it would mean what it plainly imports or it would demonstrate negligence by the maker. It is too slight a circumstance to say, that because the unusual word was in writing it eliminates wholly what is printed.

C.

BOOKS RECEIVED.

The Law of Bills, Notes and Checks. Being the full text of the Negotiable Instruments Law as adopted by forty-four states, the District of Columbia and Hawaii; with copious annotations, forms and illustrations. By James L. Whitley of the New York Bar, former Assistant Corporation Counsel of City of Rochester, Member of Committee on Banks, New York

State Legislature and author of *Police Officers' Law*. Rochester, N. Y. National Law Book Company. 1917. Price, \$4.00. Review will follow.

HUMOR OF THE LAW.

Down in the Kentucky Purchase they had an old fellow on the witness stand and the attorney said to him, "Well, Mr. Smith, you know where Mr. Brown lives?" "Oh, yes, very well." "How far is it from the place where this trouble occurred up to Mr. Brown's house?" "Well, if you go straight through the fields it is not more than a quarter of a mile but if you go around the preambles of the road it is a mile and half."

Senator Lodge was talking about certain investigating committees. "Some of them, he observed, 'remind me of Si Hoskins. Si got a job at shooting muskrats, for muskrats overrun a millowner's dam. There in the lovely spring weather, Si sat on the grassy bank, his gun on his knee. Finding him one morning, I said:

"What are you doing, Si?"
"I'm paid to shoot muskrats, sir," he said.
"They're underminin' the dam."

"There goes one now," said I. "Shoot, man! Why don't you shoot?"

"Si puffed a tranquil cloud from his pipe and said:

"Do you think I want to lose my job?"—Chicago Herald.

"You say, madam" said the lawyer to a woman in the witness box, "that the defendant is a sort of relation of yours. Will you please explain what you mean by that—just how you are related to the defendant?"

"Well, it's just like this. His first wife's cousin and my second husband's first wife's aunt married brothers, named Jones, and they were own cousins to my mother's own aunt. Then, again, his grandfathers on my mother's side were second cousins, and his stepmother married my husband's stepfather after his father and my mother died, and his brother Joe and my husband's brother, Henry married twin sisters. I ain't never figured out just how close related we are, but I've always looked on 'im as a sort of cousin."

WEEKLY DIGEST

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1. Assault and Battery—Accidental Collision.—Where collision between defendant's automobile and that in which injured party was riding was an accident brought about by defendant's negligence and without intent to commit an assault, there could be no conviction under statute defining assault and battery.—Coffey v. State, Tex., 200 S. W. 384.

2.—Injury to Social Position.—In action for alleged unprovoked assault, the measure of damages was the injury, pain and suffering, expenses for medical care and treatment, and loss of time, if any, and the jury should not have been permitted to consider injuries to professional standing, social position, or good repute, especially in the absence of evidence of such injuries.—Guterson v. Jensen, Wash., 170 Pac. 352.

3. Assignments—**Receivership**.—Where a corporation has contracted to buy a large amount of iron ore, and becomes insolvent, and cannot handle it, and receivers are appointed, a contract by the receivers with another to take the ore as delivered and dispose of it for benefit of creditors, held not an assignment of a cause of action for a prior breach of the seller in

refusing to deliver.—Hanna v. Florence Iron Co. of Wisconsin, N. Y., 118 N. E. 629.

4. Attorney and Client—Relationship.—Attorney for receiver in mortgage foreclosure does not violate his obligations by purchasing the certificate of sale and obtaining a deed thereon. Kock v. Burgess, Ia., 166 N. W. 275.

5. Bailment—Conditional Sale.—Despite Rem. Code 1915, § 1156, where plaintiff was not in possession, lien for work done on motor car at instance of seller held superior to rights of plaintiff who purchased under conditional sale contract, though contract was made and recorded before work was done.—Barbour v. Hodge, Wash., 170 Pac. 115.

6.—Lien for Repairs.—Under Acts 1903, p. 260, § 1, one engaged in repairing automobiles and furnishing materials therefor was entitled to lien for repairs made for conditional buyer of automobile.—Weber Implement & Automobile Co. v. Pearson, Ark., 200 S. W. 273.

7. Bankruptcy—Corporation.—A corporation may file a voluntary petition in bankruptcy.—In re S. & S. Mfg. & Sales Co., U. S. D. C., 246 Fed. 1005.

8.—Preference.—That husband transferred to his wife property recorded in his name within four months of bankruptcy made transfer presumptively fraudulent as to existing creditors in view of Civ. Code, § 3442.—Phillips v. Huffaker, Cal., 170 Pac. 431.

9.—Proof of Claim.—Under Bankruptcy Act July 1, 1898, § 57, final judgment in state court against bankrupt, which had been discharged, establishing amount of debt or claim, should be framed in such limited form as not to involve judgment in personam, but adequate to enable creditor to reap benefit of proof of claim.—Barry v. New York Holding & Construction Co., Mass., 118 N. E. 639.

10. Banks and Banking — Assumption of Debt.—Where assets of embarrassed state bank had been transferred to defendant in consideration of its assumption of its liability, contract between defendant and directorate of such bank held inadmissible to affect rights of creditors.—Citizens' Nat. Bank of Stamford, Tex., v. Pigg, U. S. C. C. A., 246 Fed. 902.

11.—Distribution of Corporate Assets.—Where stockholders of banking corporation have illegally withdrawn and distributed its assets among themselves, its receiver may maintain action to compel them to refund to him on bank's behalf sufficient funds to satisfy valid judgment against it.—Well v. Defenbach, Idaho, 170 Pac. 103.

12. Bills and Notes—Consideration.—Notes executed and delivered to bank for money used by makers to save a third person's land from sale under execution, and in return for his old note, were supported by consideration.—Farmers' State Bank of Greentop v. Sloop, Mo., 200 S. W. 304.

13.—Fictitious Person.—Where note for stock was made payable to W. E. D. & Co., and was indorsed by W. E. D. in the name W. E. D. & Co., in which name he did business, it was not payable to a "fictitious person," within L. O. L., § 5842, providing that a note is payable to bearer when it is payable to a fictitious or

non-existing person, and that fact is known to the person making it so payable, though the stock was not owned by W. E. D. & Co.—*Hill v. McCrow*, Ore., 170 Pac. 306.

14.—General Demurrer.—In action on note given for agency of a churn, defendant's averment that the churn was wholly incapable of doing the work that the payees represented to him that it would do, and was of no use, and unsalable, is very general, but is sufficient against a general demurrer.—*Lang v. Bohlen*, Tex., 200 S. W. 429.

15. **Bridges—Warranty.**—Plan showing supposed position of bedrock furnished by New York City to its bidders and contractor to construct foundations of tower of bridge held such a representation or warranty as to position of bedrock as to bind city and render it liable for additional costs to contractor caused by mistake.—*Faber v. City of New York*, N. Y., 118 N. E. 609, 222 N. Y. 255.

16. **Brokers—Contract.**—Where president of corporation engaged in manufacture of explosives, after having conducted negotiations with prospective purchaser, turned matter over to plaintiffs, who were acting for corporations as brokers in other matters, with directions that they should conclude contract, plaintiffs were not, as to such purchaser, acting as brokers.—*Bassick v. Aetna Explosives Co.*, U. S. D. C., 246 Fed. 974.

17.—**Marketable Title.**—Answer of one sued for commission by one furnishing a buyer that the buyer was not ready, able and willing, put in issue the merchantability of title of certain property the buyer was to apply on the purchase price.—*Thomas v. Long*, Ia., 166 N. W. 287.

18. **Cancellation of Instruments—Equity.**—Where it appears inferentially that defendant was holding land as a guardian when she fraudulently prevailed upon plaintiffs to sell to her at an inadequate price, a complaint was not demurrable as not calling for equitable jurisdiction, although the court might not be able to grant the specific relief prayed for.—*Marshall v. Gustin*, Ore., 170 Pac. 312.

19. **Carriers of Goods—Unloading.**—Where a carrier unloaded a cargo 48 hours before fire burned the dock, destroying shipper's goods, which it had so covered with others that shipper could not remove them, the relation of shipper and carrier still obtained, and carrier was liable.—*Lagomarsino v. Pacific Alaska Nav. Co.*, Wash., 170 Pac. 368.

20. **Carriers of Live Stock—Stockyards.**—Carrier of live stock owes no duty to local buyer or seller of stock, as to installation of stockyards scale for his convenience, until stock is tendered for shipment.—*Cahill & Redman v. Great Northern Ry. Co.*, S. D., 166 N. W. 306.

21. **Carriers of Passengers—Act Constituting Relation.**—One who purchases a ticket at 11 a. m. for a train leaving at 6 p. m., who intends to stay in the station to keep warm, is not a passenger, and may be ejected.—*Thomas v. Bush*, Mo., 200 S. W. 301.

22.—**Redemption of Unused Tickets.**—Under Code Supp. 1913, § 2128a, requiring railroads to redeem unused tickets, railroad can reasonably require ticket holders to surrender their tickets

and submit written statement as to why the ticket was not used, to be sent to general passenger agent for redemption.—*Prichard v. Chicago & N. W. Ry. Co.*, Ia., 166 N. W. 299.

23.—**Negligence.**—Where a conductor rings to go on while in the front of a street car without looking back to see if anyone was rising to get off, he is negligent.—*Poak v. Pacific Electric Ry. Co.*, Cal., 170 Pac. 159.

24. **Champerty and Maintenance—Alienation.**—Where minor Cherokee freedman attempted to convey part of his allotted land, and, after majority, conveyed by warranty deed to another, validity of latter conveyance was not affected by champerty statute, Rev. Laws 1910, § 2260, as alienation was controlled by congressional enactment.—*Nivens v. Adams*, Okla., 170 Pac. 473.

25. **Chattel Mortgages—After-Acquired Property.**—Mortgage on chattels to be afterwards acquired is valid between parties and as to all others having notice, which notice may be given to creditors of mortgagor and subsequent purchasers as prescribed by Rev. Codes, § 3408.—*Dover Lumber Co. v. Case*, Idaho, 170 Pac. 108.

26.—**Description of Property.**—Description of cattle mortgaged by giving the number, their location by section, township and range, and the names of persons from whom they were purchased and the number purchased from each, is sufficient as between the parties to the mortgage.—*Theodore Hamm Brewing Co. v. Flagstad*, Ia., 166 N. W. 289.

27.—**Irregular Foreclosure.**—Under chattel mortgage providing for public or private sale with or without notice at any convenient place in county where chattels are situated, sale outside of county is an irregular foreclosure.—*National Bank of Commerce of Forum v. Jackson*, Okla., 170 Pac. 474.

28. **Commerce—Employe.**—Whether section foreman on track used in interstate commerce was employed therein when injured would depend on work he was actually engaged in when injured, regardless of whether he accomplished such work.—*Atlantic Coast Line R. Co. v. Tomlinson*, Ga., 94 S. E. 909.

29.—**Interstate Transaction.**—Contract for sending telegrams from one state to another is one involving interstate commerce, and, so governed by the federal law, not allowing damages for mental anguish.—*Hall v. Western Union Telegraph Co.*, S. C., 94 S. E. 870.

30. **Conspiracy—Co-Conspirators.**—Party who took active part in consummating exchange of land, and corroborated false representations, previously made, held a conspirator if conspiracy in fact existed, though not connected with deal until after original contract of exchange was made.—*Wolfgram v. Dill*, S. D., 166 N. W. 309.

31. **Contracts—Restraint of Trade.**—Contract by lessor not to engage in poultry business for five-year term of lease within radius of 15 miles is not void; territory embraced not being so extensive as to make contract against public policy.—*Boone v. Burnham & Dallas*, Ky., 200 S. W. 315.

32. **Corporations—Guarantor.**—Brewing corporation can legally guarantee performance of any condition in lease to saloon keeper who

stipulates exclusively to sell such corporation's beer.—Depot Realty Syndicate v. Enterprise Brewing Co., Ore., 170 Pac. 294.

33.—**Tender.**—Tender of stock bought on agreement that it might be returned at buyer's option at certain figure, and demand that defendant perform his contract was seasonably made, though not on precise date named in contract; time not being of the essence.—Matthew v. Bauman, Minn., 166 N. W. 343.

34. **Damages**—Impairment of Sight.—In action for personal injuries, though not entitled to recover for slight impairment as direct injury because not alleged, plaintiff could recover for brain laceration, such injury having been alleged, and to prove it could introduce evidence of impairment of sight.—Chesapeake & O. Ry. Co. of Indiana v. Perry, Ind., 118 N. E. 548.

35.—**Mitigation of.**—Where, pursuant to contract for purchase of skimmed milk, defendants installed vats in plaintiff's creamery to receive it and employed cheese maker to manufacture it, and thereafter notified plaintiff that they would no longer comply with contract, plaintiff could not, without making some effort to reduce loss, permit milk to become total loss and then hold defendants liable for contract price.—Fulton v. Canno, N. Y., 118 N. E. 633, 222 N. Y. 189.

36. **Deeds**—Inadequate Consideration.—Imprudent conveyance of property without receiving any valuable consideration therefor, or for grossly inadequate consideration by weak, aged, or infirm person amounts to constructive fraud, and equity will intervene to compel restoration.—Keller v. Cox, Ind., 118 N. E. 543.

37. **Disorderly House** — Common Bawdy House.—That on a single occasion there was a gathering of lewd men and women at a house for lewd purposes did not constitute it a "common bawdy house."—State v. Seba, Mo., 200 S. W. 300.

38. **Divorce**—Custody of Child.—Where a husband and wife were divorced, and the mother was given the custody of a child, an attempt by her to give her child to her parents by will does not constitute any right to the child's custody as against the surviving father.—Rallihan v. Motschmann, Ky., 200 S. W. 358.

39. **Eminent Domain** — Public Use.—That lands are taken for use pursuant to general project involving creation of new municipal highways, the removal of railroad and trolley terminals so as to connect sections of university campus does not deprive improvement of its public character.—Rowland v. Mercer County Traction Co., N. J., 102 Atl. 814.

40.—**Public Use.**—The use of water for irrigation of lands by private persons constitutes a "public use" and in aid thereof the lands of another may be condemned for ditch purposes.—Young v. Dugger, N. M., 170 Pac. 61.

41. **Estoppel**—Record of Assignment.—Estate of purchaser of bond and mortgages which, with the assignment, were left with attorney who did not record assignment and through forged or fictitious assignments obtained a loan on the mortgages, held not estopped to set up its rights.—Sterling Leather Works v. Liberty Trust Co., N. J., 102 Atl. 841.

42.—**Evidence.**—Where claimant when asked by decedent when drawing his will, how much he owed her, answered that he owed nothing, and had paid, and he thereupon gave her a small bequest, held, that she was estopped to assert claim for board and care.—Davis v. Smock's Estate, Wisc., 166 N. W. 311.

43. **Exchange of Property**—Presumption.—Where one speaks of exchanging for a "building," it may be assumed that he referred as well to the land on which it stood.—Thomas v. Long, Ia., 166 N. W. 287.

44. **Food**—Misbranding.—On a trial for shipping oil, misbranded, in that it was offered for sale as lemon oil, of which it was an imitation, evidence that defendant's salesman represented that it was pure lemon oil held admissible.—Weeks v. United State, U. S. S. C., 38 Sup. Ct. 219.

45. **Fraud**—Presumption.—When it appears that parties occupied unequal positions, and that one occupying superior position has gained a substantial advantage, there is a presumption of fraud or unconscionable dealing which makes out a *prima facie* case, unless overcome by proof.—McCowen, Probst, Menaugh Co. v. Short, Ind., 118 N. E. 538.

46.—**Willfulness.**—The word "willfully," as used in Rev. Laws 1910, § 993, providing that "one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," implies not only knowledge of the thing, but a determination with an evil intent to do it or omit doing it.—Citizens' State Bank of Okeene v. Cressler, Okla., 170 Pac. 230.

47. **Guaranty**—Failure of Consideration.—Where bond guaranteeing loans and discounts to corporations from bank is signed by surety on consideration that bank shall make such loans and discounts in consideration of execution and delivery of agreement, unless loans or discounts are made on faith of bond, consideration for surety's promise fails.—Utica City Nat. Bank v. Gunn, N. Y., 118 N. E. 607, 222 N. Y. 204.

48. **Habeas Corpus**—Custody of Child.—In controversies over custody of children there is very strong presumption as to right and fitness of surviving parent, and fact that circumstances required that father at birth of child and death of the mother surrender it to his wife's sister, who kept it for three years, is not conclusive against him.—Winter v. Winter, Ia., 166 N. W. 274.

49. **Highways**—Law of Road.—Where plaintiff's automobile while stopped on left of center of road was struck by defendant's automobile going in same direction, defendant could not be held guilty of contributory negligence; Clv. Code 1912, § 2157, requiring driver to keep to the right.—Smoak v. Martin, S. C., 94 S. E. 869.

50.—**Negligence.**—That defendant constructing transmission lines for carrying electricity had franchise to occupy highway gave it no right to negligently expose traveling public to dangers of unguarded hole dug in constructing its line.—Indiana Utilities Co. v. Wareham, Ind., 118 N. E. 572.

51. **Injunction**—Quo Warranto.—Injunction to restrain persons from acting as directors of private corporation for having been irregularly

elected, are not proper in absence of special legislation, since quo warranto affords adequate and appropriate remedy.—*Grant v. Elder*, Colo., 170 Pac. 198.

52. Insurance—Estoppel.—That insured paid increased assessments for four years did not constitute ratification, of estopping beneficiary from claiming that assessments were illegal.—*Supreme Council, Catholic Knights of America, v. Wathen*, Ky., 200 S. W. 320.

53.—False Representation.—Inquiries in application for life insurance as to whether applicant had ever used liquor, and in what quantities presently and in past, inhered in report of insurer's medical examiner, so that false answers as to past use, in absence of fraud on examiner, were no defense to insurer, under Code, § 1812.—*Boultong v. New York Life Ins. Co.*, Ia., 166 N. W. 278.

54.—Fidelity Contract.—Under bond guaranteeing national banking association against losses from defalcations, etc., of employees, held that surety was liable for losses of association in honoring checks drawn by employee on his account, where it did so relying on his representations that check drawn on another bank which he deposited to his credit was good, when in fact it was worthless.—*Maryland Casualty Co. v. First Nat. Bank of Montgomery*, Ala., U. S. C. C. A., 246 Fed. 892.

55.—Theft.—Under policy covering loss from theft from fireproof safe by persons entering safe by tools or explosives, opening of inner doors by explosives was "entry into the safe" by explosives, and it was immaterial that outer door had not been so opened.—*T. J. Brunner Co. v. Fidelity & Casualty Co. of New York*, Neb., 166 N. W. 242.

56.—Unearned Premium.—Where insurer has elected to treat a policy of insurance as void for breach of condition providing for a forfeiture, the assured has no claim upon it for any unearned premium.—*Meyers v. German Fire Ins. Co.*, Neb., 166 N. W. 247.

57. Landlord and Tenant—Eviction.—In an action of unlawful detainer under a clause in a lease that the landlord could evict lessee if he ran his business so as to create a nuisance and arouse criticism among the other tenants, evidence as to reputation of the place was admissible.—*W. B. Hutchinson Inv. Co. v. Van Nostern*, Wash., 170 Pac. 121.

58. Libel and Slander—Innuendo.—To state of another "he has robbed me of hundreds of dollars" does not impute robbery as defined by Rev. St. 1909, § 4530, and is actionable only in connection with an innuendo setting forth the meaning intended.—*State ex rel. Harriman v. Reynolds*, Mo., 200 S. W. 296.

59. Licenses—Classification.—It was not improper classification to provide in one ordinance for the licensing of jitneys operating over particular routes, and in another ordinance for the licensing of service cars confined to no particular route.—*Ex parte Parr*, Tex., 200 S. W. 404.

60.—Delegation of Power.—Unless it can be shown that work of laying concrete sidewalks affects public health, morals, safety, or welfare, state would have no power to restrict or prohibit it, and no power to delegate such power to municipality.—*State v. City of Sheridan*, Wyo., 170 Pac. 1.

61. Livery Stable and Garage Keepers—Garage Defined.—Garage is a place for the care and storage of motor vehicles, and in which they are kept for hire, and a livery stable is a place where horses are groomed, fed and hired, and vehicles kept for hire.—*Grimes v. State*, Tex., 200 S. W. 378.

62. Mandamus—Election Inspectors.—Mandamus will not lie to correct errors in return of election inspectors, unless they appear upon return or upon tally sheet, as court has no

power in such proceeding to open ballot box or direct recount.—*People ex rel. Fiske v. Bantz*, N. Y., 168 N. Y. S. 965.

63. Master and Servant—Course of Employment.—Where servant of tinner while riding in master's wagon to place a job was being done, got out while the horse was being watered, and was killed while crossing street to buy tobacco, the accident did not arise out of his employment within the Workmen's Compensation Act.—*In re Betts*, Ind., 118 N. E. 551.

64.—Hazardous Work.—County employee killed by lightning while working on steel grader held not within Workmen's Compensation Act, § 16, such work not being extrahazardous.—*Wiggins v. Industrial Accident Board*, Mont., 170 Pac. 9.

65.—Independent Contractor.—Where, at request of sawmill's independent contractor to manufacture lath, on promise of more money, mill's employee left and went to work in lath mill, no legal duty rested on sawmill, when its employee changed, to inform him of situation that operator of lath mill was independent contractor.—*Raftis v. McCloud River Lumber Co.*, Cal., 170 Pac. 176.

66.—Safe Place to Work.—Where employee was sent into tank which was being repaired, to fasten loose brace rods and fell when he stood on a loose brace rod, held that there was no negligent failure to furnish a safe place to work.—*Riback v. Chicago, St. P., M. & O. Ry. Co.*, Ia., 166 N. W. 292.

67.—Venue.—Under Workmen's Compensation Act, § 67, providing penalty for master's failure to make required reports of accidents to employees and mail them to the Industrial Board, the offense occurs in the county of the employer's business, and the venue of the action for the penalty is in that county.—*In re Burk*, Ind., 118 N. E. 540.

68.—War Conditions.—In view of pendency of war, casting great burdens on transportation system, held that it cannot as matter of law be declared that crews of engines used to push trains over grades were kept on duty more than 16 consecutive hours, in violation of Hours of Service Act, § 2, where at end of trips they were given rest periods, during which they were relieved of all duties.—*Pennsylvania R. Co. v. United States*, U. S. C. C. A., 246 Fed. 881.

69. Mechanic's Liens—Contract.—Where a contractor entered into two contracts filed on different dates for different parts of same work, a bond of surety company purporting to cover a single contract filed on one of the dates, reciting a consideration equal to the sum of the two, covers both contracts.—*Hollenbeck-Bush Planing Mill Co. v. Amweg*, Cal., 170 Pac. 148.

70.—Statutory Compliance.—Lien Law, § 15, held sufficiently complied with by filing assignment of moneys due under contract to build passenger station where it contained statement of substance of contract assigned; it not being necessary that contract and assignment be filed on separate papers.—*American Hardware Corp. of New York v. Lytle*, N. Y., 118 N. E. 604, 222 N. Y. 201.

71. Mines and Minerals—Mineral Land.—Land valuable for coal is "mineral land" within the meaning of the public land laws.—*United States v. Sweet*, U. S. S. C., 38 Sup. Ct. 193.

72. Mortgages—Parties to Action.—Where under trust deed trustee sold more parcels of land than was necessary and applied proceeds to trust deeds not yet in default, fact that debt for which the sale was made was paid out of money received from parcels illegally sold, when there was sufficient money from land first sold, did not make such creditor a necessary party to set aside the unnecessary sales.—*Smith v. Woodward*, Va., 94 S. E. 916.

73. Municipal Corporations—Estoppel.—One charged with operating an automobile for hire without a license in violation of an ordinance was in no position to question the validity of the ordinance by reason of the authority therein given to revoke the license.—*Ex parte Parr*, Tex., 200 S. W. 404.

74.—Evidence.—In a personal injury action against a city, plaintiff need not plead the absence of light at a crossing as negligence in order that it may be considered as bearing on

the question of contributory negligence.—*Birkhimer v. City of Sedalia*, Mo., 200 S. W. 298.

75.—**Franchise.**—A state may ratify franchise granted by municipality without authority which excepted grantee of franchise from exercise of state's police power of regulation.—*Winfield v. Public Service Commission of Indiana*, Ind., 118 N. E. 531.

76.—**Joy Riding.**—When two or more persons engaged in joy riding upon alleged defective street at a dangerously high rate of speed, they assumed risk of danger not only from violent movement of the car, but from the inability of the driver to avoid accident.—*Winston's Adm'r v. City of Henderson*, Ky., 200 S. W. 330.

77.—**Pollution of Water.**—It is no defense to action against a city for pollution of water course that others than defendant contributed to cause the nuisance, as there can be no contribution between joint wrongdoers.—*Orton v. Virginia Carolina Chemical Co.*, La., 77 So. 632.

78. **Nuisance—Similar Business.**—Where business, etc., is of such a character that, standing alone, it would be a nuisance, fact that other nuisances existed in same locality, producing similar damage, would be no defense.—*Orton v. Virginia Carolina Chemical Co.*, La., 77 So. 632.

79. **Officers—Appointive and Elective.**—General rule is that in absence of special provision to contrary, resignation shall be tendered, in case of appointive officer, to person or body having power to appoint successor, and, in case of elective officer, to officer or body having power to order new election.—*In re Opinion to the Governor*, R. I., 102 Atl. 802.

80. **Railroads—Acceptance of Charter.**—Acceptance of charter granting railroad company right to locate railroad not exceeding named width, followed by its occupation for railroad purposes for part of named width, does not create presumption railroad company laid out its road over entire width.—*New York, N. H. & H. R. Co. v. Armstrong*, Conn., 102 Atl. 791.

81.—**Proximate Cause.**—If plaintiff's failure to stop his automobile did not proximately contribute to collision at point where street crossed defendant's railroad, it would not bar recovery.—*Chicago, I. & S. A. Co. v. Neizgodski*, Ind., 118 N. E. 559.

82. **Receiving Stolen Goods—Guilty Knowledge.**—Proof of "facts and circumstances" showing that defendant "ought to have known" that property he bought was stolen, is sufficient proof of guilty knowledge on prosecution under St. 1917, § 4417, for knowingly receiving stolen property.—*State v. Jacobs*, Wisc., 166 N. W. 324.

83. **Release—Construction of.**—Release executed to city of New York by contractor to construct foundations for bridge which referred only to claims for work done under contract was no defense to city against contractor's claim for damages for breach.—*Faber v. City of New York*, N. Y., 118 N. E. 609, 222 N. Y. 255.

84.—**Misrepresentation.**—Contract of settlement of a cause of action procured by a misrepresentation of a material fact, though innocently made, may be rescinded by one relying upon it.—*Smith v. Great Northern Ry. Co.*, Minn., 166 N. W. 350.

85. **Removal of Causes—Diversity of Citizenship.**—Where it appears that defendant, as to whom diversity of citizenship does not exist as a cause for removal, was employee of his co-defendant, that his liability is predicated on nonfeasance rather than misfeasance or malfeasance is not material.—*Sumey v. Craig Mountain Lumber Co.*, Idaho, 170 Pac. 112.

86. **Parent and Child—Agency.**—There is no presumption that a minor child is the agent of the father in driving the latter's car, or that when driving such car he is acting within the scope of his authority.—*Hays v. Hogan*, Mo., 200 S. W. 286.

87. **Physicians and Surgeons—Negligence.**—Charge against physician of negligence in choice of method of treatment is refuted by showing respectable minority of expert physicians approved of method selected.—*Swanson v. Hood*, Wash., 170 Pac. 135.

88. **Sales—Description of Property.**—A bill of sale describing property, "as described in deed from W. to T.," etc., sufficiently described the property.—*Trabue v. Ash*, Tex., 200 S. W. 415.

89.—**Warranty.**—One contracting to sell sheep, and agreeing that the sheep so offered shall be of better quality than certain sheep exhibited, and that lambs shall weigh between 60 and 70 pounds, where inspection is not available, warrants the truth of such agreement.—*Walters v. Ditto*, N. M., 170 Pac. 47.

90. **Specific Performance—Honest Mistake.**—Testamentary trustee, vendor of lot, will not be compelled to convey for price agreed upon; it appearing clearly that trustee was honestly mistaken as to frontage or area of land in fixing price, based on its having frontage or area less than it really has.—*Coppage v. Equitable Guarantee & Trust Co.*, Del., 102 Atl. 788.

91. **Statutes—Ambiguities.**—State's police power will not be presumed to have been abandoned by state's grant of charters and franchises to public service corporations, and in case of ambiguity all doubt must be resolved against abandonment of such powers.—*Winfield v. Public Service Commission of Indiana*, Ind., 118 N. E. 531.

92. **Sunday—Transactions on.**—Pen. Code 1911, art. 303, excepting from prohibition of Article 302 against transactions on Sunday, keepers of livery stables and certain other establishments, held not to except dealer in automobile supplies under rule of *eiusdem generis*.—*Grimes v. State*, Tex., 200 S. W. 378.

93. **Telegraphs and Telephones—Change in Service.**—Dismantling of direct telephone line is not objectionable change in service, within Gen. St. 1915, § 8341, where company has established another indirect line efficiently handling all business without detriment to public or individuals.—*State v. Southwestern Bell Telephone Co.*, Kan., 170 Pac. 26.

94. **Vendor and Purchaser—Evidence.**—On issue whether farm on which plaintiff had paid part of price was as good as any farm in county, evidence as to character of the subsoil and farm's market value was admissible.—*Nelson v. Berkner*, Minn., 166 N. W. 347.

95.—**Front Foot.**—Sale of lot was none the less in effect sale by front foot, though seller, after fixing price as based on price per foot, result being \$6,025, reduced it to even \$5,000.—*Coppage v. Equitable Guarantee & Trust Co.*, Del., 102 Atl. 788.

96.—**Marketable Title.**—In an agreement to convey good title, the words "good title" mean nothing less than an estate in fee or a marketable title, which can again be sold to a reasonable purchaser.—*Upton v. Smith*, Iowa, 166 N. W. 268.

97.—**Rescission.**—Where officer of vendor corporation went with plaintiff's agent and pointed out certain land as included in the tract to be sold, and such representation induced the sale and was relied on, when such land was not included, the purchaser could rescind.—*Jackson v. Northwestern Trust Co.*, Ore., 170 Pac. 304.

98. **Wills—Extrinsic Documents.**—Where testator directed that trust funds be paid as his wife's will might direct, and that he should be deemed to have pre-deceased her if order of death was unknown, as was the fact, and wife made a will reciting power and giving property affected thereby, giving effect to testator's intent, did not violate rule against enlarging wills by reference to extrinsic documents.—*In re Fowles' Will*, N. Y., 118 N. E. 611, 222 N. Y. 222.

99.—**Postponed Enjoyment.**—Provision "This deed to take effect immediately on the death of both grantors herein," following granting clause in warranty deed, held not to postpone passing of interest, but merely enjoyment.—*Shaul v. Shaul*, Iowa, 166 N. W. 301.

100.—**Testamentary Character.**—An instrument describing itself as a "will testament," undertaking as "will" part of property to signer's sons and remainder to widow, who was named administratrix, acknowledged and recorded, but not witnessed, was testamentary in character and not a conveyance.—*Coburn v. Simpson*, Kan., 170 Pac. 383.

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COMPETENCY IN FEDERAL COURTS OF WIFE IN PROSECUTION AGAINST HU- BAND UNDER WHITE SLAVE ACT.

In Denning v. United States, 247 Fed. 163, the Fifth Circuit Court of Appeals holds that a wife is a competent witness in a prosecution in a federal district court against a husband under the White Slave Act, notwithstanding that the law of the state where the prosecution is pending forbids her to testify against the husband except in cases involving physical violence to her person.

As to the district court being bound by the Texas rule, the Court says: "It is perfectly clear, from the decisions of the Supreme Court of the United States, that state statutes regulating the admission of testimony in criminal cases have no application to the trial of such cases in federal courts," citing U. S. v. Reid, 12 How. 361; U. S. v. Logan, 144 U. S. 263. This we believe to be true upon the ground that the rule in criminal cases did not come within the conformity section of the judiciary act, but was under the judiciary act of 1789, which, as said in the Reid case, referred federal courts to the common law.

In Rosen v. U. S., 38 U. S. 148, 86 C. L. J. 95, it was held that incompetency of a witness in a criminal case, under state law, because of conviction for forgery, did not fix his status in a prosecution in a federal court, sitting in the state.

There also the Supreme Court further held, that the "dead hand of the common law rule" embodied in the judiciary act of 1789 was no longer to be respected, because of "the very great weight of judicial authority developed in support" of a modern rule which permits "hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit

and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent." It is said that "this principle has come to be widely, almost universally, accepted in this country and in Great Britain."

The rule making the husband and wife incompetent as witnesses for or against each other must be carefully distinguished from the rule which regards certain communications between them as confidential and therefore privileged. The two rules rest on different grounds. The first rule is grounded on the common law idea of the unity of the marital relation, while the other is supported on reasons of public policy. There is no tendency observable in the modern cases to disturb the latter rule while the former is generally regarded as existing simply as an ancient and honorable heirloom of the common law that the courts hesitate to discard.

Historically, there seems to be little authority for declaring, as some courts have done, that the rule making husband and wife incompetent to testify for or against each other rests upon any grounds of public policy. There can hardly be said to be any interests of justice or of the marital relation to be served by prohibiting either spouse to testify for or against the other where such testimony does not seek to disclose any confidential communication received one from the other.

Blackstone himself conceded that the rule of incompetency rested solely on the old common law rule which excluded witnesses from testifying who were interested in the result. The learned commentator says:

"But in trials of any sort, they are not allowed to be evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of the person; and, therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law, '*nemo in propria causa testis esse debet*,' and if

against each other, they would contradict another maxim, '*nemo tenetur seipsum accusare.*'"

Witnesses are no longer excluded on the ground of interest; and the statutes which have abolished this disqualification, have necessarily left the rule excluding husband and wife as witnesses for or against each other without much support.

If the common law rule as to the incompetency of husband or wife for each other had any other basis than interest in the result of the trial because of the unity of the relation, why was it that even at common law in proceedings where neither was a party in interest, husband or wife could testify even if such testimony "tended to criminate the other, or to subject the other to a legal demand." (Jones Ev., 1912, p. 927.) This is not the case with respect to the rule as to confidential communications which operates in collateral proceedings, as well as in proceedings where either spouse is a party in interest.

It is also to be observed in this connection that where the statute removes interest as a disqualification, a wife may testify for or against her husband provided she is also a party of record and in interest.

The particular result of the decision in the principal case is merely to enlarge a well recognized exception to the general rule at common law, that either spouse could testify for or against the other in proceedings based on a personal injury committed by one spouse upon the other. The point in controversy, and upon which some of the authorities are in conflict, was whether a prosecution against a husband for inducing his wife to go from state to state for purposes of prostitution is a proceeding "based on a personal injury inflicted by the husband upon the wife." While strictly speaking, this case could hardly be said to come within the old common law exception, yet as the court intimates, under the more liberal tendency of the recent cases to get away from a rule which seems to have so little to support it,

the application of the general common law exception to the facts in the principal case, seems to be amply justified.

There can be no doubt that ultimately our courts will come to the same sane conclusion, as the English courts have done, that since interest no longer disqualifies a witness, a husband or wife may testify even in cases where the other spouse is a party, except as to confidential communications made to each other during the marriage.

A. H. R.

NOTES OF IMPORTANT DECISIONS.

INTERNATIONAL LAW — WAIVER OF SOVEREIGNTY BY FOREIGN GOVERNMENT BY BRINGING SUIT.—In 85 Cent. L. J., 369, we noticed a decision by District Court, Northern District of New York, and we criticised the ruling therein. This decision has been reversed by Second Circuit Court of Appeals. *Kingdom of Roumania v. Guaranty Trust Co.*, 247 Fed. (Not yet reported.)

The facts show that one Ardit began an action against the Guaranty Trust Co. and the Kingdom of Roumania, in a claim against the latter for breach of contract and to impress a lien upon funds of the latter in possession of the former. The Kingdom brought suit against the Trust Company to recover an alleged balance in its hands upon a credit alleged to be due the Kingdom. The district court, while admitting the immunity of this Sovereign Kingdom from suit, claimed that the immunity had been waived by its resort to the courts of this country to enforce its alleged rights against the Trust Company and that this waiver was general in its effect and as to everybody.

The Circuit Court of Appeals, after citing several cases decided by U. S. Supreme Court showing waiver of immunity from suit said:

"These authorities arose on quite a different state of facts. In the present case there is no specific fund. The relation between the Kingdom of Roumania and the Guaranty Trust Company being the usual one of debtor and creditor existing between banks and depositors, we are clear that the action by the Kingdom of Roumania to recover a debt owed it by the Guaranty Trust Company was not a waiver of its immunity as a sovereign to be sued by other parties. If this be not so the immunity

can be frittered away either by interpleader or attachment in any case where a foreign government undertakes to collect a debt owed it."

In the cases cited there were suits against officers of a sovereignty touching specific funds and the sovereignty put itself into the case by its own intervention. In the instant case, however, it was brought in by a third person for his own purposes. But even in a case regarding a specific fund it was said that the sovereignty had solemnly appeared and answered plaintiff's complaint and, therefore, was estopped to deny the court's jurisdiction. If a foreign sovereignty has any right to invoke jurisdiction at all, that it does so penalizes it in no way so far as third persons are concerned. An estoppel of the nature claimed would be to subject a sovereignty to a consequence it cannot possibly anticipate and in itself confers a right so attenuated in nature as to have no real existence in fact.

INTERNATIONAL LAW—RE COURSE BY OWNER OF PROPERTY APPROPRIATED BY REVOLUTIONARY LEADER.—In *Oetjen v. Central Leather Co.*, 38 Sup. Ct. 309, decided by U. S. Supreme Court there was involved the question of title acquired by defendant to property seized by a revolutionary leader in Mexico and by him sold to defendant. It was held that when a government originating in revolution is recognized by the political department of this country as its *de jure* government, the purchaser of property so seized and sold receives so far as the courts of this country are concerned a valid title as against an assignee of the owner, such recognition being retroactive so as to validate the actions of such leader.

The court goes into a review of the political conditions in Mexico from the time of the assumption of the office of president by Huerta, along through the revolution inaugurated by Carranza and his commissioning of Villa as one of his generals and the final success and recognition of the government thus inaugurated.

The property in question was sold to pay an assessment made by order of Gen. Villa and defendant became its purchaser.

It was said by the court that this being property at the time of seizure and sale belonging to a citizen of Mexico, and being taken by a duly commissioned military commander in the progress of a revolution, it is to be regarded as a military contribution and such seizure and sale is not the subject of re-examination and modification by the courts of this country.

"The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based on acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations."

In a companion case decided by U. S. Supreme Court on the same day it was held that where property seized and sold as aforesaid belonged to an American citizen, who was neither in Mexico nor a resident in that country, the principle above stated applied in the same way. His remedy, if any, must be determined by the courts of Mexico or through the political departments of this country. *Riccaud v. American Co., Ltd.*, 38 Sup. Ct.

The principle acted on in both cases appears to us undoubted and indisputable.

DIVORCE—INDIGNITIES AS CONSTITUTING CRUEL AND ABUSIVE TREATMENT.—In *Armstrong v. Armstrong*, 118 N. E. 916, decided by Supreme Judicial Court of Massachusetts, it is held that where cruel and abusive treatment is a ground for divorce, neither words nor acts not involving physical injury, though causing unhappiness and loss of health, are proof of cruel and abusive treatment, unless they were uttered or committed with malicious intent to injure.

The court said: "The spouse may be guilty of drunkenness or other vices; his habits or disposition, his indifference, neglect or desertion, may cause mental worry and injury to health, but these acts, standing by themselves are not enough to make out a case of cruel and abusive treatment * * * unless it is shown that the language was uttered or these acts were committed with a malicious intent and for the purpose of injuring the libellant."

In this case the wife testified that the husband "stayed away longer than he ever had in four years and went out many evenings;" that when she spoke to him about this he said: "he had been going with a girl in Boston"; that "she expostulated with him and told him of her suffering," and he said he could not give up the girl, and she became worried and sick and has not completely recovered her

health. There was a finding that the wife lacked no attention during sickness and the impairment of her health was because his affections had been alienated. There also was proof of a disgusting act by the husband in his wife's presence and this was held contributory to her ill health.

Defining the term cruelty in divorce statutes has always been difficult for the courts, since in almost every state courts have limited the term to its common law meaning and no authoritative or accurate definition was ever made by the ecclesiastical courts. And, moreover, like the term, fraud, it is a word inherently incapable of definition since it comprises in its scope, the incalculable depths of infamy to which human ingenuity may descend.

It is easier, therefore, to say what does not constitute cruelty than to declare what does. Probably no better affirmative rule could be adopted than that laid down in the principal case. At any rate since men and women are not perfect and since the law does not attempt the impossible, cruelty should not be held to consist in any sum of vices and misadventures in which both men and women are likely to fall, and which are not the product of a studied and malicious attempt of one spouse to bring injury upon the other.

SALES AND DELIVERIES OF ARTICLES IN INTERSTATE COMMERCE LOSING OR RETAINING THEIR INTERSTATE CHARACTER.

Introductory. The shipment of oil in bulk and of gas in pipes has caused some recent discussion among courts in respect to the original package ruling and the breaking of bulk in sales. In this article the cases are cited relative thereto and especially recent cases as to distribution of gas by means of facilities controlled by public service commissions.

Breaking Original Package.—It must be conceded, that supplying a customer in another state with an article as part of a mass from which other customers are to be supplied, does not amount to a breaking up of the mass so as to bring the sale under local

control. Thus the Supreme Court in a very late case ruled that, where a foreign corporation shipped into a state a tank car of oil from one exterior point and a car load of barrels from another exterior point, so as to fill orders taken by a traveling salesman, the sale and delivery to the customers severally constituted no breaking of the bulk so as to make either or any of the transactions local in character.¹

A Tennessee case,² referred to approvingly in the Lipscomb case, *supra*, many bulk shipment cases decided by U. S. Supreme Court, in which different purchasers already contracted with to be supplied, deduce the conclusion, that an oil company, shipping a tank car of oil, could fill separate contracts for oil from the mass conveyed, as protected transactions under the commerce clause.

The breaking of bulk or package so as to bring sales therefrom under local law must be in a state where a sale is made and without authority by the seller in the foreign state. Thus where a portrait company shipped pictures and frames from Chicago on orders solicited in North Carolina, the shipping of the pictures in one or more packages and the frames in another or other packages, "the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent at Greensboro, (N. C.), who delivered them to the purchasers, does not deprive the transaction of its character as interstate commerce. It may be only that the vendor used two instead of one agency in the delivery.³ And it was held that where brooms had been sold on solicited orders, the fact that they were tied in bundles and tagged and marked only according to the number ordered, making delivery to different customers from

(1) *Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 37 Sup. Ct. 623, 61 L. ed. 1181.

(2) *Western Oil Refining Co. v. Dalton*, 131 Tenn. 329, 174 S. W. 1138.

(3) *Caldwell v. North Carolina*, 187 U. S. 622, 33 Sup. Ct. 229, 47 L. ed. 336.

the bundles did not make a breaking of the bulk local transactions.⁴

Article at Rest in State So as to be Withdrawn from Interstate Commerce.—But though a shipment be made in interstate commerce, yet it may become subject to local law if there is such interruption in its transit before reaching a point for delivery, as may make it subject to local regulation. Thus the Supreme Court held,⁵ that where a domestic corporation having its plants for the manufacture of oil in Pennsylvania and Ohio, transported oil in tanks to itself or consignee in Memphis for the purpose of distribution in smaller vessels for the filling of orders for customers in Arkansas, Louisiana and Mississippi, it came to rest in Tennessee so as to be subject to state law. Said the court: "It was only there for distribution, it is said, to fulfill orders already received. But to do this required that the property be given a locality in the state beyond a mere halting in its transportation. It required a storage there—the maintenance of the means of storage; of putting it in and taking it from storage. The bill takes pains to allege this. This certainly describes a business—describes a purpose for which the oil is taken from transportation, brought to rest in the state, and for which the protection of the state is necessary—a purpose outside of the mere transportation of oil."

Two of the bench, Justices Moody and Holmes, dissented from this view on the ground that as the oil had been sold before starting on its journey and was stopped "only momentarily for the purpose of repacking and reshipping it," that "the delay was to meet the exigencies of interstate commerce, which arose out of the nature of the transaction. * * * It would no more seem to be the subject of taxation

(4) *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. ed. 295. See also *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. ed. 565.

(5) *General Oil Co. v. Crain*, 209 U. S. 211, 28 Sup. Ct. 475, 52 L. ed. 754, affirming S. C. 117 Tenn. 82, 95 S. W. 824, 121 Am. St. Rep. 967.

than a drove of cattle, whose long interstate journey was interrupted for humane reason, to give them a few days of rest and refreshment." The dissent also pointed out that this case was readily distinguishable from a former case,⁶ where articles shipped in interstate commerce came into a state, were placed in a warehouse for sale and from there sold to persons within as well as without the state.

The Crenshaw case, *supra*, and in a later case,⁷ in both of which state rulings were reversed, it was held, that delivery to customers by draymen employed by consignors of goods not identified as separately set apart, but selected from the mass by checking from original orders, did not come under the rule of "rest" as declared in the Crain case, *supra*. The Tennessee Supreme Court in the Dalton case, *supra*, expressed its regret that the Crenshaw and Stewart cases did not speak more "pointedly touching the test conceived to have been formally applied" by the Supreme Court, to-wit: "the preappropriation of the commodities to respond to the order of the bargaining customer." We discover, however, from the Crain case there may be a "rest" in the state, subjecting to local influence, though this be no more than to arrange for distribution among customers an article shipped in bulk, and though the shipper uses his own storage for this purpose and makes his own segregation for his customers, to whom the article shipped in bulk has been preappropriated. What shall be said, when to accomplish distribution he must rely on means regulated by local authority?

Employing Drays to Assist in Deliveries.—The Stewart case, *supra*, holds that where goods were shipped in carload lots from Chicago to points in Michigan and upon arrival orders therefor were filled by delivery at the car to customers by draymen employed by the shipper, such deliveries were

(6) *Am. Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. ed. 538.

(7) *Stewart v. Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 58 L. ed. 786.

in interstate commerce, providing such deliveries were on orders previously solicited. There was no stress placed on the fact, that resort was made to drays that had to be licensed by the state, but generally the case was held to come under the rule in the Crenshaw case. That case speaks of ranges shipped being "loaded on delivery wagons and delivered by the delivery men to purchasers in the precise shape, form, condition and packages in which they were delivered to the common carrier" at the point of shipment. But in this case no notice was taken of this feature. It may be that there was no need to notice this feature, because licensing of draymen is regarded merely as a revenue law, and is not intended to preclude draymen getting business from whomsoever may see fit to employ them. At all events no point was made as to their employment in this way, as being the using of a facility under control of the local jurisdiction. It is to be thought, however, that had the state expressly provided, that draymen delivering interstate articles only should be required to pay a license the same as where they were engaged in other work the statute would be valid, provided no discrimination be made against such articles in their charges.

Using Facilities Authorized by Local Franchise.—Suppose, however, that a foreign corporation sends goods sold in interstate commerce to a destination and there it is necessary to resort to means in franchise for their delivery to customers? There is a possibility that a seller using a pipe line for the transportation of water, oil or gas, might need for complete delivery to its customers the use of conveyors in the streets of a municipality? Can it be supposed that the commerce clause meant so far to interfere with domestic arrangements as to commandeer them for the benefit of interstate commerce in effecting delivery of articles sold therein? Is it not enough to preclude local regulations from discriminating against such articles? Naturally it would seem sufficient for congress to re-

quire, that from the agency lawfully used in transportation, delivery may be effected without any discrimination in the use of other necessary means in the effecting of complete delivery. If residents may freely use these necessary means, so may non-residents, and whether the articles be subject to state law as a part of the mass of things there located or not. But the resident in using these other things may come under a rule or regulation to which these other things are subject.

Correlative Obligation in Use of Franchise.—In a noted insurance case Justice Lamar, in dissent, in speaking of property, devoted to public use, said:⁸ "Some of them had franchises. Most of them used public ways or employed property which they had acquired by virtue of the power of eminent domain. They were therefore subject to the correlative obligation to have the use, of what had thus been taken by law, fixed by law." While Justice Lamar dissented from the rest of the Court as to this correlative obligation existing as to the business of insurance, there can be no doubt of it so far as regards other businesses. This obligation, however, arises from dedication under legal principle to public use. This dedication is a part of domestic policy. It puts upon property of this kind a new burden. May it not be said that one using it submits himself to this limitation, that he comes into its operation according to state law? If so, that which was before an article in interstate commerce ceases to be such by the will of the owner of the article and is transferred to the mass of things located in the state and subject to its laws.

There is nothing in the cases I have cited above that prevents this conclusion. In them it was claimed that the shipper from another state had done nothing that brought to an end the sway of commerce over the shipment—there had only been a rest in interstate commerce and refinement was in-

(8) German-Alliance Ins. Co. v. Lewis, 233 U.S. 389, 34 Sup. Ct. 612, 58 L. ed. 1011.

dulged to show whether or not this was true. But to place property where it comes under state regulation, seems to present deliberate acceptance of burden or benefit, according as the act of placing may be viewed. This makes no particular difference. "*Qui sentit commodum, sentire debet et opus.*"

Having enunciated these general principles I will discuss two cases disposed of by Supreme Court of Kansas⁹ and by the District Court of Kansas,¹⁰ in which the opposing results were reached.

View of Kansas Supreme Court.—This case concerned two natural gas companies in an action by the attorney-general of Kansas for violating the state's anti-trust laws, and praying for ouster and the appointment of a receiver. In the suit receivers were appointed and they asked for an order making the Public Utilities Commission of the state a party defendant. It interposed a demurrer to the jurisdiction of the court, which was sustained by the Supreme Court and the injunction against it was set aside. This permitted the commission to proceed in its duty, as conceived by it, in regulation of the distribution of gas in the state and fixing of the rates therefor.

The court said: "It is contended that the receivers are engaged in interstate commerce, and for that reason are beyond the control of the public utilities commission. That the transportation of natural gas from one state to another is interstate commerce must be conceded. * * * The original package rules will be of some assistance in determining whether or not the receivers' sale of gas in this state is interstate commerce. The original package of gas is broken when the first gas is taken out of the pipe lines and sold in this state. Thereafter the gas ceases to be an article of interstate commerce. * * * If the analogy

of original packages or importation of property in bulk applies to gas in the mains, it ceases to apply when thousands of service pipes are filled with gas to be drawn off at such times and in such quantities as the individual consumer desires. Interstate commerce is at an end when the bulk of the imported gas is broken up for indiscriminate distribution to individual users at retail sale. The gas then becomes mixed with the common mass of property in the state."

I digress here a moment to say, that in none of the cases above referred to, no claim is made that any article was protected beyond delivery to a purchaser secured as such by the seller before it was shipped in interstate commerce, and certainly, not if he resold it, whether in general trade or by any private contract. If this gas did not come into general trade, it was solely because its sale came under state regulation. In federal view in either event the result would seem to be the same.

As to the effect of such regulation this opinion further said: "Before selling natural gas it became necessary to obtain franchises from the several cities under the laws of this state. These laws provided that in certain classes of cities the franchise owners might name the price at which gas should be sold. If the business done by the receivers in this state is interstate commerce and the state has no power to regulate the price at which gas may be sold, the laws providing for fixing rates in franchises were invalid, so far as gas coming from another state is concerned."

It lacks something of being a conclusive argument, that state laws would be invalid by reason of the reach of interstate commerce. But it is legitimate to inquire whether it would be deemed a rest in the transportation of an article in commerce, that the owner thereof submits its sale to state law, because there is no law of congress for its sale after its coming to an alleged rest.

It is urged there is a rest because the commerce clause and acts of congress for

(9) *State ex rel. Kaster, v. Landon*, 96 Kan. 372, 152 Pac. 22.

(10) *Landon v. Pub. U. Coun. of Kansas*, 234 Fed. 152; S. C. v. S. C., 245 Fed. 950.

its enforcement are of uniform application throughout the country, but natural gas is not the sort of an article where a uniform law would apply, because of its nature. I am not greatly impressed with this kind of an argument, but it has been urged in an Indiana case.¹¹ There it was said that: "Natural gas is characteristically and peculiarly a local product, and because of its local characteristics and peculiarities it is a proper subject for state regulation, and cannot, so far as regards local protection, be made the subject of general legislation by congress."

The vice in this argument, as I conceive it, that this is not as concerns its being piped into another state, but as it remains where it is found. But one of the cases cited by the opinion in this case,¹² is to the effect that some occupations and some articles carried on or sold come under state police power. Gas, whether sold in the state where found or sold in another state, conceivably is under the state police power where sold. If it is transported from one state to another, it may come successively under the police power of both states. But, if in transportation it comes to a point where it passes under state police power, though before within the protection of the commerce clause, there is a radical departure from its former state, and this whether or not those to whom it is to be delivered were selected as buyers before shipment was started in the state from which it is being transported.

It has been held that a statute forbidding the transportation of natural gas from one state to another was an interference with interstate commerce,¹³ but that does not necessarily embrace the question I am considering. That statute was a general prohibition regarding an article as an article and not with respect to any police power in

its movement. I imagine a statute safeguarding its transportation for protective reasons, would be held valid with regard to shipment for interstate as well as local purposes.

The rule declared by this Indiana case has also been held by U. S. Supreme Court,¹⁴ but in that case the Court based its decision solely upon the purpose of a statute to exclude from interstate commerce natural gas as a product, saying "there is no question in the case of the regulating powers of the state over the natural gas within its borders."

A federal case¹⁵ considered the effect of this Supreme Court case on the right of a public service commission to fix the rates for gas transported in interstate commerce. It was said: "We are unable to agree that the fixing of rates to be charged to their customers in West Virginia is an unlawful regulation of interstate commerce. * * * Nothing is attempted except the regulation of the prices of natural gas to the citizens of West Virginia to be charged by corporations operating in West Virginia under state authority. The action of these corporations in uniting their operations with those of like corporations of Ohio and Pennsylvania in pumping gas into a common system of pipes supplying customers in the three states may produce the result that some from Ohio and Pennsylvania comes into West Virginia. * * * But this interflow of gas from one state to another, according to the pressure from the main gas pipes as common reservoirs cannot affect the power of the state of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens."

It might be contended, that this act of mingling the products put it into the mass of property in the state, but it seems much more reasonable to say that putting it where

(11) Jamieson v. Indiana Nat. Gas Co., 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652.

(12) Crowley v. Christensen, 134 U. S. 86, 34 L. ed. 620.

(13) State ex rel. v. Ind. & O. Oil, etc., Co., 120 Ind. 575, 6 L. R. A. 579.

(14) West v. Kansas Nat. Gas Co., 221 U. S. 229, 31 Sup. Ct. 564, 55 L. ed. 716, 35 L. R. A. (N. S.) 1193.

(15) Manfrs. Light & Heat Co. v. Ott, 215 Fed. 940.

it became subject to state regulation is the decisive factor. If it was for indiscriminate distribution to whomsoever might apply, this would show that customers by contract prior to its transportation were not regarded. If the cases considered in the first part of this article went to pains to identify customers before shipment, it must be because they were regarded as necessary factors in determining whether a sale is in interstate commerce or not.

View of District Court, Supra.—In the first ruling in 234 Fed. 152, *supra*, the question of the right of the Kansas Public Utilities Commission to control the rates of natural gas transported from another state is given very scant attention, and the Kansas Supreme Court is represented as declaring that this "gas was not of an interstate character." On the contrary, this court expressly declared that: "The transportation of natural gas from one state to another is interstate commerce must be conceded." In 245 Fed. 950 *supra*, however, the same judge presiding, it was said: "Now as to the question of interstate commerce * * * The question of storage has been presented and pressed with great earnestness as being a very important factor to be taken into consideration in determining this question of interstate commerce. But to my mind the evidence shows that such storage as exists is merely incidental to the transportation of the gas, and in fact it is a necessary incident to the proper and efficient transportation of the gas."

It may be true, that mere storage of gas may be an incident, but, if gas is taken out of storage and carried into pipe lines for indiscriminate distribution in a state, or if it is put into pipe lines for such distribution, the question becomes vastly different. The prior ruling was that the receiver was selling gas piped into another state and there delivered to parties in cities and towns of the latter state were sales in interstate commerce. Nothing is said about the use of the streets of the towns and cities or of the pipes laid there by virtue of franchises, but

it is to be implied that there were franchises used for such purpose.

But there are cited a number of rulings to the effect that incidental storage, or that which aids transportation, is not material. I will take up these rulings in the order in which they are cited.

The first case is that of *Kelly v. Rhoads*,¹⁶ That case showed that a herd of sheep was being driven from a point in Utah through Wyoming on their way to Nebraska. While en route they were suffered to spread out and graze over the land they passed over. The state of Wyoming attempted to impose a grazing tax on the herd. The court said: "The question to be determined is, whether the stock of the plaintiff was brought into the state *for the purpose of being grazed* at the time it was assessed for taxation." The court held that if only being driven through the state to a market "they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit." In this it does not appear that the herd was in course of being sold and delivered to any purchaser or that any state franchise was being resorted to to effectuate delivery.

The next case is that of *Swift & Co. v. United States*.¹⁷ This case shows that as cattle were shipped with the expectation that their transit would end with their purchase in another state, and was done with only the interruption necessary to find a purchaser at the stockyards and this was shown to be a constantly recurring course, their purchase was but an incident in interstate commerce. Justice Holmes speaks of such interruption as "a typical, constantly recurring course," but interfering with "the current of commerce among the states." It was said also that the cattle in the stockyard were not at rest under the rule laid down in *American Steel & Wire Co. v. Speed*, 192 U. S. 500. That case held that

(16) 188 U. S. 1, 23 Sup. Ct. 259, 47 L. ed. 359.

(17) 196 U. S. 373, 25 Sup. Ct. 276, 49 L. ed. 518.

goods brought in original packages and stored at a distributing point and subsequently to be delivered in the same packages to purchasers in various states are at rest in the state and are enjoying the protection of its laws, are taxable in the state. The goods were shipped to Memphis merely as a distributing point and thence to be sent on to customers on orders already taken. But the court thought that after the goods "had reached their destination at Memphis, and were there held in store at the risk of the Steel Company, to be sold and delivered as contracts for that purpose," this brought them under state jurisdiction.

The next case is *Western Oil Co. v. Lipscomb, supra*. The only thing that case decides is that where customers have been obtained on orders previously solicited, a shipment may be made in bulk to fill all the orders, the part sold to each may be drawn from a tank or container and this may be done for customers at one or more places of delivery, as designated destinations. It is the essential character of the commerce, not the accident of local or through bill of lading that is decisive." The movement in this case was not broken by its temporary stop at one of the places, where it had been destined for both places at the time of shipment and for customers with whom contracts were already made.

The next and last case is *McFadden v. Ala. Gt. So. Ry. Co.*¹⁸ a decision by Third Circuit Court of Appeals. In this case it appears that cotton intended for interstate transportation was shipped at a local rate to a place where it was to be compressed and from there rebilled to outside points. It was said: "The cotton was shipped upon an interstate rate to Birmingham, where it remained in possession and control of the carrier, subject to be divested by the defendants availing themselves of a provision in the bill of lading directing delivery to their order. This the defendants might have done but never did. Therefore, we are to determine the character of the transporta-

tion by what was intended * * * rather than what might have been done. * * * The stop in Birmingham was not the end of the journey, but was merely an interruption necessary to prepare the cotton for a journey to be continued.

In the Landon case citing those authorities, the journey had been ended and the question no longer remained one of storage, nor was there incident in further transportation to be considered. The only question was whether the gas was ready for delivery and what means should be used in delivery. If to customers not by contract previously secured there was no interstate carriage so far as they were concerned. If to deliver to customers secured by contract, could facilities only usable under local franchise be compelled without surrender of the owner to local jurisdiction? I think it plain that they could not.

N. C. COLLIER.

St. Louis, Mo.

LIABILITY INSURANCE—INTEREST.

CASEY-HEDGES CO. v. SOUTHWESTERN SURETY CO.

Supreme Court of Tennessee. Feb. 11, 1918.

201 S. W. 139.

Under policy, insuring against loss, where an appeal was taken from a judgment recovered against insured on the claim for personal injuries, the insurer was liable for the interest accruing on the portion of the judgment for which it was liable; such interest coming within the term "moneys expended in said defense," which by the policy were to be excluded from the limitation of liability.

GREEN, J. This suit was brought to recover a balance alleged to be due complainant on an employer's liability policy. There was a decree for the complainant below, from which defendant has appealed.

The complainant is a manufacturer in Chattanooga, and in 1912 obtained a liability policy from the defendant covering accidents to complainant's employees.

One J. R. Oiphant, an employe of the complainant, sustained certain injuries in the

(18) 241 Fed. 562, 154 C. C. A. 338.

course of his work alleged to have been due to complainant's negligence, and brought suit for \$25,000 damages in the District Court of the United States. Notice of this suit was given to defendant surety company, and the defense thereof was conducted jointly by the complainant and the surety company. There was a judgment in the District Court for \$6,000. A writ of error was sued out in the name of the complainant, and the case carried to the Circuit Court of Appeals, where the judgment of the trial court was affirmed. 228 Fed. 636, 143 C. C. A. 158.

An effort was made to obtain a review of the case on certiorari, which was denied by the Supreme Court of the United States. Meanwhile an execution issued and was levied on property of the complainant to satisfy the judgment in favor of Oliphant and his costs and interest on said judgment pending the disposition of the writ of error by the Circuit Court of Appeals. This execution was paid off by the complainant.

The surety company paid to the Casey-Hedges Company the sum of \$5,000, but denied liability for any part of Oliphant's costs recovered, and for any part of the interest which had accrued on the judgment of the District Court.

This bill was filed to recover the amount of Oliphant's costs and interest on \$5,000 of judgment.

The principal controversy is with reference to the defendant's liability for any part of the interest which accrued on the judgment of the District Court.

It may be conceded that the greater number of adjudicated cases construing policies such as the one under consideration hold that interest on a judgment accruing during the time that an appeal therefrom is pending is not a part of the costs and expenses of the litigation in such a sense that it may be allowed in excess of the stipulated indemnity. Davison v. Maryland Cas. Co., 197 Mass. 167, 83 N. E. 407; Munro v. Maryland Cas. Co. *supra*; National, etc., Worsted Mills v. Frankfort, etc., Ins. Co., *supra*; Coast Lumber Co. v. Aetna Life Ins. Co., 22 Idaho, 264, 125 Pac. 185, and other cases collected in notes Ann. Cas. 1914D, 1067, and 43 L. R. A. (N. S.) 1128.

The question is undecided in this state, and with due deference we think that the view announced in the cases just cited is too narrow, and we are not inclined to follow these authorities.

Under the stipulations of the policy the insured has no control of the course of the litigation after the liability company undertakes the defense. Any interference on the part of the assured may forfeit his rights under the policy. He has no voice whatever in determining the propriety of an appeal. It would seem, therefore, that interest accruing during an appeal on so much of a judgment as the insurer was liable for should be borne by the insurer. To that extent the appeal is prosecuted for the benefit of the insurer.

It is said, however, that the whole matter rests in the domain of contract, and that it is competent for the parties to agree that the liability of the insurer shall be so much and no more. This is undoubtedly true, and the question should be determined on the contract made between the parties.

In the contract before us the insurance company undertook to respond to the extent of \$5,000 for damages sustained by the assured on account of bodily injuries suffered by the insured's employee. The insurer also reserved the right to assume the management and defense of any suits brought to recover such damages against the insured, and, when it assumed the defense, undertook to defend at its own expense—the moneys expended in such defense not to be included in the limit of liability previously fixed.

The insurer not only agreed to reimburse the insured to the extent of \$5,000 for loss sustained for damage claims, but also stipulated that it could conduct any suit, the defense of which it undertook, at its own expense.

The expense of the latter undertaking, therefore, is expressly excluded from the limitation of liability for damages on account of the accident.

Is the interest on that part of a judgment for which the insurer is ultimately liable accruing during the prosecution of an appeal, taken at the instance of the insurer, a part of the expense of the litigation or of the defense?

We think it is. The interest on a judgment during such period is fixed by law. It applies to every case and is taxed on every judgment which is not reversed in the appellate courts. It is incident to every appeal and part of the expense of every unsuccessful appeal. The prosecution of an appeal or a writ of error is a part of the defense, and expense so incurred is an expense of the defense. We can see no reason for excluding such an item from

the obligation of the policy to reimburse the assured for "moneys expended in said defense."

Such interest is commonly taken into consideration by counsel along with costs in advising about the propriety of appellate proceedings, and is reckoned as a possible expense of litigation.

This is the result reached by the Kentucky Court of Appeals in *Aetna Life Ins. Co. v. Bowling Green Gaslight Co.*, *supra*. Such also appears to be the opinion of the Circuit Court of Appeals for the Sixth Circuit in *New Amsterdam Cas. Co. v. Cumberland Telephone & Telegraph Co.*, 152 Fed. 961, 82 C. C. A. 315, 12 L. R. A. (N. S.) 478. See, also, the dissenting opinion in *Saratoga Trap Rock Co. v. Standard Acc. Ins. Co.*, 143 App. Div. 852, 128, N. Y. Supp. 822.

Responding to one of the arguments advanced by the courts disallowing a recovery of interest under such circumstances, the Kentucky Court said:

"An attempt, however, is made to distinguish between the items of damage and cost and the items of interest, and the argument is made that as the assured had the use of the \$5,000 during the appeal, and as this use was worth the interest, therefore, this should not be accounted an expense, as the assured did not lose anything by paying the interest. But this argument overlooks the fact that the assured had to pay to the claimant the interest it now demands, and unless it recovers it from the insurance company, it will be out this item of expense incurred by the litigation. If the insurance company had paid the \$5,000 when the judgment was rendered in the lower court, at which time the claimant first became entitled to interest that would have ended its liability under the policy. But this it refused to do, and now, unless it pays the interest that accrued on this \$5,000 after that time and pending the appeal, the assured will lose it. The fact that the assured had the use of the \$5,000 pending the appeal has nothing to do with who shall pay this interest, but if it did, the parties would be on an equal footing, because the insurance company also had the use of the \$5,000 during the appeal. It is simply a question of which one should bear this item of expense, and we think the insurance company should."

In the case before us the writ of error seems to have been sued out with the consent of the insured. Both the insurer and insured joined in the prosecution of this writ of error in the Circuit Court of Appeals. The judgment affirmed was for \$6,000. The insurer was liable for \$5,000, or five-sixths of this judgment. The insurer is here seeking a recovery of five-sixths of the interest accrued and paid by it.

The chancellor pronounced a decree in favor of the complainant for the costs and five-sixths

of the accrued interest paid by it, and this decree will be affirmed.

Note.—Interest on Indemnity Policy After Judgment, Where Indemnitor Requires Appeal.—In line with the instant case and greatly on like reasoning is *Ravenswood Hospital v. Maryland Casualty Co.*, 280 Ill. 103, 117 N. E. 485, which case was noticed by this journal in 86 Cent. L. J. 2. The same cases in support of the opposite contention are cited there as in the instant case, and other cases also. In regard to interest on the judgment pending appeal being expense additional to the maximum stipulated to be paid, the Illinois court said: "Had appellant (the Indemnity Company) elected to pay the amount of this judgment to appellee, then liability for interest on its part would have ceased, and had appellee elected to prosecute the appeal it would have had the use of \$5,000 paid to it by appellant during the time the appeal was pending. But appellant did not choose to do this, but on the contrary insisted upon the case being appealed to the Appellate Court. Under the terms of the policy appellee was compelled to participate in the appeal or forfeit its rights under the policy. While the case was pending in the Appellate Court interest accumulated on the judgment, which appellee ultimately was required to pay. In the meantime appellant retained and had the use of the \$5,000 which ultimately was applied in satisfaction of the judgment, on which appellee was required to pay interest. The policy, as we have seen, reserved to appellant full control over the defense of such action, and in consideration thereof it agreed to defend such action at its own cost. The appellant does not contend but that this included all of the expenses necessary and incidental to the carrying of such case by appeal to the Appellate Court, such as the procuring of the record, abstracts, briefs and argument, attorney fees and court costs. Interest on a judgment is as much an incident to the expense of carrying a case to the Appellate Court as are the court costs."

In *Century Realty Co. v. Frankfort-Maine Acc. & P. Co.*, 179 Mo. App. 123, 161 S. W. 624, the reasoning of the court proceeds in like way and a clause is quoted to the effect that if the company offers to pay the full amount of the policy it shall not be further bound "for any costs and expenses which the assured may incur in defending the same." This is argued to give the company an avenue of escape which it may take if it sees fit.

Further this court says that: "Construing this contract in its most favorable light in favor of the assured and having in mind the dual meaning of the word 'costs' and mindful of the word 'expenses' and the contracts as to their payment, we came to a consideration of the question as to the liability of the Frankfort Company for payment, not only of court costs, but of interest accruing between the date of the judgment, as originally entered and the payment thereof, payment having been suspended pending the determination of the case by the Supreme Court." So considering the matter it was concluded that the accruing interest was a liability of the company to the assured.

In *Rumford Falls Paper Co. v. Fidelity & Cas. Co.*, 92 Me. 574, 43 Atl. 503, an assured was held

entitled to recover from insurer the maximum of policy and interest from the time of its rendition. There is an elaborate discussion of the nature of the contract, and it appears that two dates for the running of interest are considered, one from the time the verdict was rendered and the other, more than a year later, when the assured paid the costs.

We think the trend is towards construction given in the cases cited. The same distinction pointed out in the instant case from those cited to the opposing view is stressed in the cases rejecting them.

C.

ITEMS OF PROFESSIONAL INTEREST.

MEMORIAL ON REDUCING NUMBER AND LENGTH OF JUDICIAL OPINIONS.

The last meeting of the American Bar Association authorizes a memorial to the courts of the United States on the danger of accumulated precedents. The memorial was presented to the Pennsylvania Supreme Court on January 11, 1918, and the account of it in the Philadelphia Legal Intelligencer will not be without interest to the readers of this journal. Our contemporary says:

On the 11th inst., Russell Duane, Esq., who had been appointed by the President of the American Bar Association for the purpose, presented to the Supreme Court the "Memorial to the Courts of the United States and the Appellate Courts of the several States," prepared by the Committee on Reports and Digests.

This memorial calls attention to the great accumulation of authorities in America within the last thirty years, and suggests that such accumulated precedent becomes unwieldy and ultimately places in jeopardy "our whole theory of customary as distinguished from codified law, and may impair, if not destroy our doctrine of the sanctity of judicial precedent."

The memorial also suggests that the length of opinions may be materially reduced with advantage, and that certain "concrete steps" have so often been discussed that they may be treated as representing the common judgment of the profession. "These are: (a) A conscious effort at the shortening of opinions and the recognition of brevity as a cardinal virtue second only to clearness; (b) an avoidance of multiplied citations and the elaborate discussions of well-settled legal principles and of lengthy extracts from text-books and earlier opinions; (c) the presentation of so much, and

no more, of the facts as are necessary to present the precise question at issue; (d) a reduction of the number of reasoned opinions, and a corresponding increase in the number of memorandum or *per curiam* decisions, with a brief statement, when necessary, of the points decided and of the ruling authorities."

Chief Justice Brown said, on receiving the memorial:

"The Bar of this State, like the bar in every other State, is the mainstay of its appellate courts. The motion is approved by this court. It was a well-timed motion and will not be unheeded by this court."

HUMOR OF THE LAW.

An old Southern judge lost a mule for which he offered a reward. For days the whole neighborhood searched for that hybrid hawss without success. That reward was in demand. After everybody else had given up the idea of ever finding the animal, the town no-account came up the street one day leading the long lost Alack.

"How in the name of the pink-toed prophet did you ever find him, Ben?" asked the astounded jurist. "Well, suh, jedge, Ah'll tell yeh," said the Hookworm One. "Ah jes' asked ma-se' whur would Ah go ef Ah was er mewl. An' Ah went. An' he had."

Judge Jas. G. Johnson, of Ohio, tells a story about an old Illinois or Iowa farmer, who had a very large estate. He had four boys. By his will he provided that the four boys should be executors and they should preserve the estate intact and pay their mother an income sufficient to keep her through her life, and at her death it should be divided among the boys. The boys did not agree upon the policy to be pursued; they disagreed and quarreled, and finally employed an attorney, and he was compelled to go to court for the purpose of settling matters. The youngest boy, a good-natured chap, was called into the lawyer's office one day in response to a request, and after he had answered a lot of questions pertaining to the affairs of the estate, he said: "I wish we could find some way that we wouldn't be all the time falling out about something; why, dog-gone it, I sometimes wish the old man hadn't died."

WEEKLY DIGEST

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1. Adverse Possession—Improvements.—Improvements by one in possession merely tends to show ownership of improvements, and is no evidence of ownership of land.—Chesapeake & O. Ry. Co. v. Rosskamp, Ky., 200 S. W. 496.

2.—Occasional Acts.—That predecessor in chain of title sought to be established by adverse possession occasionally cut timber from land is entitled to no weight in determining question of adverse possession.—Wilson v. Catron, Ky., 200 S. W. 459.

3. Attachment—Dissolution.—Giving to officer receipt in alternative for goods attached, executed by defendant and two others, dissolves attachment as to third persons, bona fide purchasers, or creditors making subsequent attachments; but as between attaching creditor, recipients, and debtor, liability of officer continues until dissolved by law.—Stewart v. Stewart Drug Co., Me., 102 Atl. 823.

4. Attorney and Client—Attorney Fee.—Where one attorney in protracted litigation obstructed a compromise and another attorney concluded it, and where one litigant was paid an amount as indemnity for his debt for attorney's fees, the former attorney could not recover fee from litigant making such payment.—Ansley v. Concrete Construction & Contracting Co., La., 77 So. 774.

5.—Disbarment.—The offense of conspiring to smuggle opium into the United States in violation of federal law is ground for disbar-

ment as involving moral turpitude within Code Civ. Proc., § 287, subd. 1.—In re Shepard, Cal., 170 Pac. 442.

6.—Unprofessional Conduct.—Making and filing by attorney of affidavit in pending proceeding charging judges with being corrupt and guilty of conspiracy is unprofessional conduct warranting disbarment under Code Civ. Proc., § 282.—Bar Ass'n of San Francisco v. Philbrook, Cal., 170 Pac. 440.

7. Bankruptcy—Adjudication.—Ordinarily finding of fact by special master, to whom application for vacation of adjudication in bankruptcy was referred, will not be disturbed when supported by evidence, yet, where facts are not in dispute, question may be considered by court, regardless of master's report.—In re S. & S. Mfg. & Sales Co., U. S. D. C., 246 Fed. 1005.

8.—Appointment of Trustee.—Attorneys for petitioning creditors may properly be appointed trustees for a bankrupt.—W. A. Liller Bldg. Co. v. Reynolds, U. S. C. C. A., 247 Fed. 90.

9.—Composition.—Composition by bankrupt with creditors should be rejected; the offer to creditors being before the bankrupt was examined in open court and had filed in court its schedules.—In re Berler Shoe Co., U. S. D. C., 24 Fed. 1018.

10.—Composition.—Any right against stockholders, because of a corporation issuing stock in exchange for property of inadequate value belonging, under Stock Corporation Law N. Y., § 55, to the creditors, is unaffected by composition with creditors by the bankrupt corporation.—In re Berler Shoe Co., U. S. D. C., 24 Fed. 1018.

11.—Exemption.—That a family corporation formed by an insolvent to take over his property to protect it from creditors, paid off valid judgments of a state court which were a lien on the property, does not render such property exempt from sale by the bankruptcy court.—W. A. Liller Bldg. Co. v. Reynolds, U. S. C. C. A., 247 Fed. 90.

12.—Preference.—A complaint by trustee attacking warranty deed by corporation which subsequently became bankrupt, is insufficient to show that deed was voidable, as preferential, where it was not alleged that grantees had reasonable cause to believe that to enforce deed at time it became absolute would effect preference.—Hoshaw v. Cosgriff, U. S. C. C. A., 247 Fed. 22.

13.—Preference.—Where wife delivered corporate stock to her husband, which he pledged, and shortly before bankruptcy he paid the debt and recovered stock, which he delivered to his wife, held that transactions, being within four months of petition, was preferential, within Bankr. Act, § 60b.—Smith v. Tostevin, U. S. C. C. A., 247 Fed. 102.

14.—Preference.—Indorsers and guarantors of notes and obligations of a bankrupt among creditors within Bankruptcy Act, § 60, subd. b, relating to preferences.—Smith v. Coury, U. S. D. C., 247 Red. 168.

15.—Preference.—Whether mortgage was valid claim against bankrupt estate cannot be decided in suit by trustee against others to set aside conveyance as preferential and as im-

fraud of creditors, those interested in the mortgage not being before court.—*Smith v. Coury*, U. S. D. C., 247 Fed. 168.

16.—**Recording of Deed.**—Where there was no subsequent purchaser before court, conveyance of Wyoming property more than four months before filing of involuntary petition in bankruptcy is not subject to attack as preferential, under Bankr. Act July 1, 1898, § 60, though not recorded more than four months before petition, Comp. St. Wyo. 1910, §§ 3653, 3654, requiring recording only to render deed effective as against subsequent purchaser.—*Hoshaw v. Cosgriff*, U. S. C. C. A., 247 Fed. 22.

17.—**Selection of Trustee.**—Where both parties went beyond what was proper in soliciting claims to vote on the selection of a trustee, the claims of one should not be disfranchised, and those of the other party allowed to be voted.—*In re Parsons Mfg. Co.*, U. S. D. C., 247 Fed. 126.

18. **Banks and Banking—Instructions.**—In action against bank for conversion of note by "assistant secretary," it was error to submit question whether plaintiff left note with officer or agent of defendant, without requiring finding whether officer or agent had authority to receive note.—*Fitzsimmons v. Commerce Trust Co.*, Mo., 200 S. W. 437.

19. **Bills and Notes—Indorsement.**—Where eight vendor's lien notes were sold to trust company, indorsed in blank and, notes being overdue, trust company sent four of them to bank for collection, purchaser of notes was affected with notice that person who sold them to trust company had parted with title, and her purchase did not affect priority of trust company's lien as to remaining four notes.—*Bolding v. Bolding*, Tex., 200 S. W. 587.

20.—**Indorsement in Blank.**—Where contract of suretyship or accommodation indorsement was signed in blank, plea merely denying all liability thereunder, was not an effort to explain intent of contract, as is permitted by Civ. Code 1910, § 5796, and does not set up good defense.—*Pearce v. Swift & Co. Fertilizer Works*, Ga., 94 S. E. 915.

21.—**Pleading.**—In action on note given for goods, plea that seller sent note to bank, and defendant had to sign and pay it before he could inspect goods, and had no opportunity of fully examining note, set up no defense.—*Ducros v. People's Drug Store*, Ga., 94 S. E. 897.

22. **Carriers of Goods—Act of God.**—Carmack Amendment does not change the common-law rule as to effect of act of God in excusing carrier from loss resulting proximately from it.—*Barnet v. New York Cent. H. R. R. Co.*, N. Y., 118 N. E. 625, 222 N. Y. 195.

23.—**Insurer.**—A transfer company as a common carrier is an insurer of safe transportation and delivery of furniture, and is liable for all loss of or injury to the furniture, unless loss is caused by act of God, public enemy, public authority, nature of goods, or fault of shipper.—*MERCHANTS' TRANSFER CO. v. Kiser*, Ky., 200 S. W. 454.

24.—**Proximate Cause.**—Carmack Amendment does not change the common-law rule as to effect of act of God in excusing carrier from loss resulting proximately from it.—*Barnet v.*

New York Cent. & H. R. R. Co., N. Y., 118 N. E. 625, 222 N. Y. 195.

25. **Carriers of Passengers—Contributory Negligence.**—Operation of a motor vehicle in a municipality at a speed in excess of that allowed by Gen. Code Ohio, § 12604, is contributory negligence per se, and should be so declared in action for injuries to a passenger in car resulting from such operation.—*Harmon v. Barber*, U. S. C. C. A., 247 Fed. 1.

26.—**Elevator in Building.**—Where express delivery man rode on freight elevator, as required, in delivering packages to tenants of office building, held that relation of carrier and passenger existed.—*O'Rourke v. Woodward*, Ala., 77 So. 679.

27. **Chattel Mortgages—Satisfaction of Record.**—Mailing by chattel mortgagee to mortgagor written acknowledgment of full payment and release, with authorization of probate judge to enter the satisfaction on the record, and letter stating it would be necessary for mortgagor to send satisfaction to judge, was not compliance with Code 1907, § 4908, penalizing failure of mortgagee to enter satisfaction.—*J. I. Case Threshing Mach. Co. v. McGuire*, Ala., 77 So. 729.

28. **Constitutional Law—Municipal Ordinance.**—Ordinance forbidding bathing in lake within city limits from which water supply is drawn, but which is private property of owners of bordering lands, where city has acquired no right to water by purchase or eminent domain, is invalid as taking of property without due process of law.—*Pounds v. Darling*, Fla., 77 So. 666.

29. **Contracts—Executory.**—If contracts remain executory on both sides, the agreement of one to annul is consideration for agreement of other to annul, but where goods sold have been delivered, the agreement that the contract should not be binding, being without new consideration, is void.—*Tacoma & Eastern Lumber Co. v. A. B. Field & Co.*, Wash., 170 Pac. 360.

30.—**Impossible to Perform.**—Contract to build mill on obligor's property is not "impossible" of performance, so as to excuse non-performance, because it could not be profitably operated without vacation of streets.—*Learned v. Holbrook*, Ore., 170 Pac. 630.

31.—**Intoxicated Party.**—One who at time of making contract is completely intoxicated, may avoid it, notwithstanding that intoxication was voluntary, but not if he is only partially intoxicated.—*Glenn v. Martin*, Ky., 200 S. W. 456.

32. **Corporations—Foreign Corporation.**—It cannot be claimed that a foreign corporation which has obtained a certificate from the secretary of state is not organized under the laws of the state, in any proceeding except a direct one by the state.—*Milliken v. Security Trust Co.*, Ind., 118 N. E. 568.

33.—**Ultra Vires.**—Under agreement authorizing trustee to certify bonds of corporation when mortgages were assigned by it to trustee, acceptance of mortgages executed by the corporation itself for trust fund and certifying bonds against them would be beyond powers of trustee.—*Conover v. Guarantee Trust Co.*, N. J., 102 Atl. 844.

34. Covenants—Restrictions.—A purchaser of lands subject to restrictive covenants was bound by the restrictions where he had at least constructive notice thereof by reason of his deed containing a covenant putting him upon inquiry.—*Pearson v. Stafford*, N. J., 102 Atl. 836.

35. Deeds—Condition Subsequent.—A condition in a conveyance providing that in the event that any creditors of the grantee sought to subject the lands to their debts, title should at once go to the grantee's children, was a valid enforceable condition.—*Scott v. Ratliff*, Ky., 200 S. W. 462.

36. Dower—Land in Another State.—Widow can claim nothing in Arkansas out of rents of husband's property in Ohio, under law of which widow is not entitled to rents out of realty of which she is to be endowed until after petition for assignment of dower has been filed in proper court.—*Mayo v. Arkansas Valley Trust Co.*, Ark., 200 S. W. 505.

37. Eminent Domain—Public Use.—Ordinance forbidding bathing in lake within city limits, from which water supply is drawn, but which is private property of owners of bordering lands, where city has acquired no right to water by purchase or eminent domain, is invalid as taking of property without just compensation.—*Pounds v. Darling*, Fla., 77 So. 666.

38. Estoppel—Acquiescence.—Where executor discharged mortgage out of rents with acquiescence of widow and all parties in interest, using rent from mortgaged property pro tanto, and balance out of other rents, it was too late, in widow's action for dower, for either party to ask accounting of the funds so applied.—*Mayo v. Arkansas Valley Trust Co.*, Ark., 200 S. W. 505.

39. Evidence—Admissibility.—In action for rent, evidence of oral agreement, contemporaneous with written lease, that latter should not take effect until landlord should install heating apparatus in and repair premises, could not be considered, if the installation and repairs were to be made during the term expressed in the written lease.—*Roseff v. Beals*, N. Y., 168 N. Y. S. 1042.

40. False Pretenses—Expression of Opinion.—Representations made to induce loan concerning financial ability of borrower and value of property conveyed as security, held not mere expressions of opinion when defendant knew prosecuting witness was relying thereon.—*State v. Hooker*, Wash., 170 Pac. 374.

41. Frauds, Statute of—Extrinsic Evidence.—In suit for specific performance of contract to sell lot, memorandum reading, "Received from Mr. B. D. Coppage two hundred dollars on account of purchase price (\$5,000) of lot of Bellah estate on Delaware Ave. above River-view Ave." defense of statute of frauds being raised, extrinsic evidence was properly admitted to identify lot as described in memorandum.—*Coppage v. Equitable Guarantee & Trust Co.*, Del., 102 Atl. 788.

42.—Guaranty.—Where, wishing to sell corporate stock defendant by indorsement on contract guaranteed agreement by his associate to sell for or purchase stock sold plaintiff, consideration of principal contract was sufficient to support contract of guaranty and take it with-

out statute of frauds.—*Miller v. Eubanks*, Ala., 77 So. 740.

43. Fraudulent Conveyances—Voluntary Conveyance.—Conveyances of debtor to sister were fraudulent as against creditors and could not stand, where only claimed consideration was that debtor promised sister that if she undertook to support their mother he would compensate her, while amount of support did not appear.—*American Surety Co. v. Conway*, N. J., 102 Atl. 839.

44.—Voluntary Conveyance.—Under laws of New Jersey, voluntary conveyance is deemed fraudulent in law as to, and voidable at instance of, creditor whose debt existed at date of conveyance, irrespective of actual intention of grantor or grantee, or of former's solvency or insolvency at time of conveyance.—*Baldwin v. Kingston*, U. S. D. C., 247 Fed. 163.

45. Gaming—Gambling Machine.—Slot machine, showing player every time he played goods procured, consisting of package of chewing gum, and sometimes in addition two or more trade checks, held gambling machine prohibited by Ky. St., §§ 1960, 1967.—*Wealch v. Commonwealth*, Ky., 200 S. W. 371.

46. Guaranty—Alteration.—Where dates of notes were changed to postpone running of interest until makers actually received consideration, guarantor under written guaranty providing that any extension might be granted, was not discharged.—*First Nat. Bank v. Spalding*, Cal., 170 Pac. 407.

47.—Binding Contract.—A guaranty that a buyer of ore, "its successors and assigns," would pay for specified amounts of ore to be delivered, does not bind the guarantor as to ore delivered to receivers; the latter not being either "successors" or "assigns."—*Hanna v. Florence Iron Co. of Wisconsin*, N. Y., 118 N. E. 629.

48. Guardian and Ward—Notice of Trust.—Where guardian sold to bank corporate bonds registered in ward's name, it was duty of cashier to inquire as to his authority to make sale, and where he did not do so, bank was not a purchaser without notice, and might be required to account.—*Hamilton v. People's Nat. Bank of Washington*, Pa., 102 Atl. 877.

49. Habeas Corpus—Extradition.—In habeas corpus, where relator was sought to be extradited for an offense in another state, the court rightly refused to go into the sufficiency of the indictment in the other state, or the merits of the defense.—*People ex rel. Goldfarb v. Gargan*, N. Y., 168 N. Y. S. 1027.

50. Homestead—Absence of Head of Family.—Law will not deprive family, consisting of husband and wife, of homestead on ground that property is not occupied as such within intent of homestead law merely because husband and head of family is absent on business in another state or away temporarily for other reasons.—*Watson v. Hulbert*, Ore., 170 Pac. 541.

51. Injunction—Laches.—Where owner of land adjoining railroad for seven years after the railroad diverted a stream so as to cause seepage on the land, asserted no rights and sought no relief, her long delay precluded equitable intervention.—*Oregon-Washington R. & Nav. Co. v. Reed*, Ore., 170 Pac. 300.

52. Innkeepers—Loss by Guest.—A hotel which operates checkroom is liable for loss of overcoat as carrier is for goods, and stipulation on check that articles are left at owner's risk is unreasonable and void.—*Maxwell Operating Co. v. Harper*, Tenn., 200 S. W. 515.

53. Insurance—Classification of.—In its primary and ordinary meaning, "class" of life in-

surance policies signifies those policies issued (a) in same calendar year, (b) upon lives of persons of same age, and (c) on same plan of insurance.—Miller v. New York Life Ins. Co., Ky., 200 S. W. 482.

54.—Contract.—The master's contract to protect the servant absolutely from violence by strikers was not void as an insurance contract made without requisite formalities.—Hansen v. Dodwell Dock & Warehouse Co., Wash., 170 Pac. 346.

55.—Loss by Burglary.—Meaning of clause in burglary policy, requiring direct and affirmative evidence of loss, is to be determined by intention of parties as expressed in policy, considering subject-matter, character and purpose of contract.—Garner v. New Jersey Fidelity & Plate Glass Ins. Co., Mo., 200 S. W. 448.

56.—Renewal of Policy.—Where an authorized agent orally agreed to renewal of a policy and nothing was said about any change in the terms or the amount of premium, the terms of the new policy were presumed to be the same as those in the old.—Liverpool & London & Globe Ins. Co. v. Hinton, Miss., 77 So. 652.

57.—Subrogation.—Where insurer of safe transmission of registered packages indemnified sender, packages having been stolen, held that such insurer was subrogated to rights of sender, and moral obligation of United States to protect its patrons by recovering on bond of thieving employee will extend to insurer.—United States v. United States Fidelity & Guaranty Co., U. S. C. A., 247 Fed. 16.

58.—Waiver.—Where insured made no representations that he was owner of land upon which building insured was situated, held company by accepting risk and issuing policy without inquiry waived condition that policy should be void if building insured was not located upon ground owned by insured.—Gregerson v. Phenix Fire Ins. Co., Wash., 170 Pac. 331.

59.—Warranty in Application.—In absence of language in policy sufficient for purpose, incorporation in it of application does not make warranties of answers therein purporting to be representations only.—Merchants' Reserve Life Ins. Co. v. Richardson, Ind., 118 N. E. 576.

60. **Intoxicating Liquors—Indictment and Information.**—Information alleging that defendant druggist knew that grain alcohol sold was not to be used for chemical or mechanical purposes, and was not sold for such purpose, presented issue of defendant's good faith.—State v. Holland, Wash., 170 Pac. 332.

61. **Landlord and Tenant—Cancellation of Lease.**—Where tenant defaulted, the lease was not canceled by the issuance in summary proceedings to dispossess him of the precept or the making of the final order therein, in view of Code Civ. Proc., § 2253, providing that the issuing of the warrant for the removal of the tenant cancels the lease, where none was issued.—Cornwell v. Sanford, N. Y., 118 N. E. 520, 222 N. Y. 248.

62.—Lease.—Where landlord owned three corners of street intersection, covenant in lease to corner grocer that no "properties on the corner" of such streets would be let to another grocer, did not apply to store adjoining such tenant in same building but on different lot.—Fenton v. Crook, N. J., 102 Atl. 834.

63. **Lost Instruments—Notice.**—Where indorser of notes, given for garage property sold, indorsed another note in consideration of destruction of first two by buyer, who had possession and substituted forgeries, he had sufficient notice of infringement of seller's rights to put him on inquiry and to prevent his defeating his obligation.—Motley v. Darling, N. J., 102 Atl. 853.

64. **Marriage—Deceit.**—In action for deceit of defendant husband in marrying plaintiff while he was husband of another, plaintiff was not bound by financial condition of defendant as of date of discovery of fraud, and it was within court's discretion to fix compensation as of date of verdict.—Larson v. McMillan, Wash., 170 Pac. 324.

65. **Master and Servant—Assumption of Risk.**—Plaintiff held to have assumed risk of injury from cutting steel rails without goggles, and company not to be liable, danger being obvious,

even though section foreman who assured him it was all right be treated as vice-principal.—Union Pac. R. Co. v. Marone, U. S. C. C. A., 246 Fed. 916.

66.—Direction of Verdict.—Where person injured by automobile, shows that the driver was in the employ of the owner, there is an inference that the servant was acting within the scope of his employment at the time of the injury, and the court cannot direct a verdict for defendant on that issue.—Penticost v. Massey, Ala., 77 So. 675.

67.—Presumption of Agency.—That a wife is driving an automobile owned by her husband with his express consent and permission raises the presumption that she was his agent, and makes a *prima facie* case against the husband in favor of one injured while she was driving the car.—McWhirter v. Fuller, Cal., 170 Pac. 417.

68.—Scope of Employment.—Indigent applicant, employed as teamster in municipal wood-yard, held, when proceeding to remove household goods of indigent family, as directed by superintendent of yard, within scope of his employment, so that city would be liable for resulting injuries.—City of Oakland v. Industrial Acc. Commission of State of California, Cal., 170 Pac. 430.

69.—Unsafe Appliance.—Employer is liable in damages for injury to employee from employer's attempt to use an apparatus generally recognized by men of practical and expert knowledge to be of insufficient size or strength to stand strain to which it is put.—Haynes v. Fisher Oil Co., La., 77 So. 781.

70.—Warning.—A master was justified in considering a servant 40 years of age, who had worked around stagings, high steel towers, derricks, lumber, bridges and was a "trigger," as qualified to move timbers along cross-beams of a trestle work without warning him of the dangers thereof.—Muriñell v. T. Stewart & Son Co., Me., 102 Atl. 824.

71. **Mechanics' Liens—Materialman.**—Act No. 167 of 1912, giving in general terms a privilege upon "buildings" or "works" in favor of laborers, materialmen, etc., gives no privilege upon public property.—Red River Valley Bank & Trust Co. v. Louisiana Petrolithic Const. Co., La., 77 So. 763.

72. **Mortgages—Evidence.**—Where owner of land after contracts to sell parts thereof executed a mortgage thereon, and as further security assigned in trust the amounts unpaid on contracts, and the mortgagor sued to foreclose, making the purchasers, but not the trustee, parties, and the priority of the purchasers' right was established, it was error to hear evidence and make findings with reference to the amount of payments received by the trustee and to conclude that the mortgage as to the purchasers had been satisfied.—Seattle Trust Co. v. Cameron, Wash., 170 Pac. 379.

73. **Municipal Corporations—Contributory Negligence.**—Passenger seated on left side of open car, who looked up street as he arose to get off on right side, and walked around front of car to cross street without looking again, and was run down by automobile coming from rear, was guilty of contributory negligence.—Di Stephano v. Smith, R. I., 102 Atl. 817.

74.—Last Clear Chance.—Where plaintiff, starting across the street, saw defendant's automobile approaching, and became confused, which the chauffeur saw, but failed to stop, the doctrine of last clear chance applied, and it was for the jury whether the chauffeur's failure to stop was the proximate cause of the injury.—Underhill v. Stevenson, Wash., 170 Pac. 354.

75.—Right of Way.—One who changes his course at street intersection is not entitled to full benefit of an ordinance providing that automobile going north or south has right of way.—Clark v. Fotheringham, Wash., 170 Pac. 323.

76. **Navigable Waters—Land Under Water.**—State had right to grant land under waters of cove below low-water mark for any public use, when possible without substantial impairment of public interest and subject to paramount right of Congress to control navigation.—New York, N. H. & H. R. Co. v. Armstrong, Conn., 102 Atl. 791.

77. Perpetuities—Rule Against. —Will intending that one-third of trust estate, income of which was to have been paid to deceased son for life, should, on his death without children, vest in children of testatrix's surviving sons as class, held not to violate rule against perpetuities, or Act April 18, 1853 (P. L. 508), against accumulations.—*In re McKeown's Estate*, Pa., 102 Atl. 878.

78. Pledge—Commercial Paper. —Pledging of commercial paper as collateral for payment of debt, without special authority thereto, does not authorize pledgee to sell paper, at private or public sale, upon default in payment, but he must hold and collect it as it comes due and apply proceeds on debt.—*Miller v. Horton*, Okla., 170 Pac. 509.

79. Principal and Agent—Imputed Knowledge. —Purchaser of notes from trust company, through agent who knew company did not propose to sell, but was demanding payment from agent, who had assumed payment, was bound by knowledge of agent, and, as against rights of trust company, acquired nothing.—*Bolding v. Bolding*, Tex., 200 S. W. 587.

80.—Scope of Agency. —It is not within the apparent scope of authority of an agent employed to buy cattle on commission to contract for his principal with others to assist him, and to bind his principal for additional commission for such purchases.—*Dawson & Young v. Nunn & Latham*, Tex., 200 S. W. 603.

81. Railroads—Discovered Peril. —Where plaintiff was climbing between freight cars, and was injured by first movement of starting of train, to recover for discovered peril, it is necessary that engineer, fireman or brakeman giving signal to start knew of his perilous position.—*Provo v. Spokane, P. & S. Ry. Co.*, Ore., 170 Pac. 522.

82.—Evidence. —In prosecution of railroad for failing to provide convenient and suitable men's privy at station, evidence for commonwealth that few persons in town had provided toilet facilities in their houses was admissible.—*Louisville & N. R. Co. v. Commonwealth*, Ky., 200 S. W. 464.

83.—Injunction. —Finding that predecessors of defendants, in railroad's suit to enjoin trespass on right of way occupied by trestle, if riparian owners, either have been compensated for strip occupied by railroad or have abandoned claim, held reasonable inference as to part of six-rod strip granted railroad for right of way at its option, over which railroad has in fact laid out tracks.—*New York, N. H. & H. R. Co. v. Armstrong*, Conn., 102 Atl. 791.

84.—Licensee. —Newsdealer and his assistant, who went upon premises of railroad company to obtain their newspapers, held licensees for whose benefit another railroad company, licensed to use right of way, was bound to exercise reasonable care.—*Pennsylvania R. Co. v. Lackner*, U. S. C. C. A., 246 Fed. 931.

85.—Licensee. —Where prospective passenger approached station along path on railroad's right of way of which it had not invited use as approach to station, intending passenger was merely licensee, to whom railroad owed no duty, except not to injure by positive negligence in operation of trains.—*Bales v. Louisville & N. R. Co.*, Ky., 200 S. W. 471.

86.—Negligence. —It is negligence for railroad without warning to make flying switch of coal cars onto track whereon freight car is standing having people in it unloading to knowledge of railroad's servants.—*Pearson v. Chicago, M. & St. P. Ry. Co.*, Mo., 200 S. W. 441.

87.—Ordinary Care. —Where decedent was driving a bus carrying passengers and drove upon the track, and was struck by a train, he did not owe to the railroad company the duty of keeping a lookout for the train, but owed only the duty of exercising ordinary care.—*Chesapeake & O. Ry. Co. v. Williams' Adm'r*, Ky., 200 S. W. 451.

88. Receivers—Appointment of. —If lawyer is appointed receiver, it is improper for him to employ another attorney, unless case is extraordinary and he has permission by special order to retain counsel.—*Simpson v. Vitaphone Co.*, N. J., 102 Atl. 871.

89. Release—Construction of. —Where servant signed receipt of "\$11 in full payment of amount due me to date," which showed number of hours he had worked, and the rate of wages per hour, without evidence that it was intended as a release from liability for injuries, it was proper to refuse instruction that, if the servant signed the receipt, verdict in action for injuries should be for the master.—*Hansen v. Dodwell Dock & Warehouse Co.*, Wash., 170 Pac. 346.

90.——Obtaining a release from a servant by figuring the amount under the Employers' Liability Act, when the master had elected not to accept that act, and telling him that the amount he so figured was all he could get, the servant believing him, was actual fraud, defined by Civ. Code, § 1572, warranting rescission.—*Carr v. Sacramento Clay Products Co.*, Cal., 170 Pac. 446.

91. Sales—Breach of Contract. —Plaintiff's failure to make further deliveries of flour contracted for will be excused by defendant's failure to pay for flour sold on open account; defendant's breach of agreement to pay for such flour amounting to a breach of entire contract.—*J. C. Lysle Milling Co. v. North Alabama Grocery Co.*, Ala., 77 So. 748.

92.—Contract. —Where seller refused to deliver coal except at advance and did not, even at advanced price, delivered all coal contracted for, buyer may for coal not delivered recover difference between contract price and market price, but as to coal delivered may recover only difference between contract price and that paid.—*Hencken & Willenbrock Co. v. Rosenwasser Bros.*, N. Y., 168 N. Y. S. 1097.

93.—Evidence. —For defendants to receive and sell flour shipped to them by plaintiff, and fail to furnish invoices or report sale as agreed, would be such an appropriation that plaintiff could treat its transaction with them as a sale, though not intended as such at time of shipment.—*Richardton Roller Mills v. Miller*, Wash., 170 Pac. 357.

94. Street Railroads—Evidence. —In action for death from negligence of street car company, findings that deceased's horse was in habit of taking flight at street cars and bolting, that deceased knew thereof, and that horse was reasonably safe, held not inconsistent with verdict for plaintiff.—*Adams v. Iola Electric R. Co.*, Kan., 170 Pac. 395.

95. Trust—Evidence. —Where husband before marriage turned over money to his wife for her to save and invest for him, it is immaterial, in action to have a trust declared, whether the marriage was legal or not.—*Cetenich v. Fuvich*, R. I., 102 Atl. 817.

96.—Extraordinary Dividend. —So much of extraordinary dividends as are derived from or constitute distribution of capital, should be credited to capital, while part derived from distribution of profits accruing during lifetime of trust in shares of stock should be credited to income.—*United States Trust Co. of New York v. Heye*, N. Y., 168 N. Y. S. 1051.

97. Vendor and Purchaser—Abandonment of Contract. —Where the vendor of land mortgaged it after contracting to sell, and thereafter the purchasers accepted deeds in consummation of their contracts, there was no abandonment of the contracts, and all rights conferred by the contract were preserved.—*Seattle Trust Co. v. Cameron*, Wash., 170 Pac. 379.

98.—Deficiency. —Where the vendor overstated the acreage, the vendee could take the land actually conveyed and have compensation by abatement of the purchase money for the deficiency.—*Manning v. Carter*, Ala., 77 So. 744.

99. Will—Construction. —Where will gave use of realty and declared that if devisee died "without leaving children" land should revert to estate and be divided among testator's other children, division was limited to such children living when devisee died.—*Craig's Adm'r v. Williams*, Ky., 200 S. W. 481.

100.—Capacity. —Where testator, 84 years of age, feeble in mind and body, was living with son to whom he left bulk of property at time of making of will, burden is on such son to show that there was no undue influence.—*In re Tutty's Will*, N. J., 102 Atl. 833.

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PRICE-FIXING RESTRICTIONS IN THE SALE OF PATENTED ARTICLES.

The close distinction sometimes sought to be made between the exclusive right of the patentee "to use" and his right "to vend" the patented article, with particular reference to restrictions sought to be imposed after sale, is wholly ignored by the United States Supreme Court in the recent case of Boston Store v. American Graphophone Co., 38 Sup. Ct. Rep. 257.

In this case it appeared that American Graphophone Co. was the owner of certain phonograph patents. Seeking to comply with certain conditions declared to be important in previous decisions of the Supreme court, the Graphophone Company put the following notice on all its manufactured articles and inserted it in all its contracts:

"All 'Columbia' Graphophones, Grafonolas, Records and blanks are manufactured by the American Graphophone Company under certain patents and licensed and sold through its sole sales agent, the Columbia Phonograph Company (General), subject to conditions and restrictions as to the persons to whom and the price at which they may be resold by any person into whose hands they come. Any violation of such conditions or restrictions make the seller or user liable as an infringer of said patents."

In addition to this notice, all dealers specially covenanted "to adhere strictly to and be bound by the official list prices established from time to time by said company" and the agreement closes with this significant clause:

"We understand that a breach of this agreement will amount to an *infringement* of said patents and subject us to a suit and damages therefor. We admit the validity of all patents under which said product is manufactured and hereby covenant and

agree not to question or contest the same in any manner whatsoever."

The evident purpose of this contract was to avoid the construction that the price limitation was a mere contract obligation, for a violation of which an action for damages might lie, and to have such limitation construed as an integral part of the patentee's monopoly "to vend," a violation of which would be an infringement of the patent.

This is the same situation which puzzled the Court in the Dick case (Henry v. A. B. Dick Co., 224 U. S. 1.), and led to the four to three decision in that case holding that a patentee might insert a limitation in his contract of sale on the "use" of a patented article that would not be permitted in the sale of an unpatented article. The Dick case was overruled in the case of Motion Pictures Patent Co. v. Universal Film Mfg. Co., 243 U. S. 502, 37 Sup. Ct. 416. In the Dick case it was sought to compel the vendee of a rotary mimeograph to purchase all supplies of ink, wax sheets, etc., from the owner of the patent. In the Motion Pictures case, the seller of a patent moving picture machine attempted to compel all users of his patent to use his films and no others.

In the principal case the Court reviews all the cases and, with two judges dissenting (Holmes and Vandeveenter), applies the principle of the Motion Pictures case to the patentee's exclusive right "to vend" a patented article and declares that this right does not authorize the patentee to impose conditions upon the re-sale of the patented article which are contrary to the policy of the law and void as being in restraint of trade.

In a very learned article by Mr. Thomas Reed Powell in 17 Columbia Law Rev. 663, the author contends that there is no difference in the right of a patentee to the *product* of his invention that is not enjoyed by the owner of an unpatented article. Every right of property based on absolute ownership includes the right to manufacture, vend

and use, but that the right of a patentee includes the right to *exclude* others from manufacturing, vending or using the patented article. Applying this reasoning in support of the decision in the Dick case the writer attempts to show that when a patentee sells his exclusive right to "use" his patented invention, he does not in effect impose limitations on the "use" in the nature of a mere contract liability on the vendee, but that he conveys only a part of his exclusive right of "use," the remainder being protected not by the contract but by the patent laws. "He has the right," says Mr. Powell "to exclude others from using in Chicago plus a right to exclude them from using in New York. He has a right to exclude from use on Monday, plus a right to exclude on Tuesday. The patentee has a right to exclude others from use with supplies manufactured by the patentee, plus a right to exclude from use with supplies manufactured by a single named competitor of the patentee, etc. If what the patent law grants is a bundle of an indefinite number of separate rights to exclude from separate specific uses, and if the patentee may part with one of these rights and still retain the others, it would seem to follow that any specific right of user not permitted by the patentee remains under the protection of his monopoly."

Referring to the practical effect of this argument, Mr. Powell observes:

"If one chooses to call this a monopoly over materials not covered by the patent, it is only a monopoly over the use of such materials with the patented mechanism. Since the materials cannot be used with the mechanism unless the mechanism be used with the materials, the complete monopoly over the use of the mechanism inevitably involves a monopoly over the use of materials with the mechanism."

The essential question in all these cases is: Does the violation of restrictions upon the subsequent use or resale of a patented article arise under the patent law or under the general law relating to contract? If a

violation of such a restriction amounts to an infringement of the patent it would be useless to argue the question whether the restriction is lawful or unlawful, since that question is foreclosed by the patent laws which grant the monopoly. If, on the other hand, the restriction is collateral to the patent right and merely an obligation created by the contract of sale, then its legality may be tested by the same rules which apply to contracts generally.

That such qualifications upon the subsequent use and resale of a patented article are not included in the patent right is clearly the effect of the recent cases. In the Boston Store case Justice White, in referring to the Motion Pictures case, declared that "it was decided in that case that one who had sold a patented machine and received the price and had thus placed the machine so sold beyond the confines of the patent law, could not by qualifying restrictions as to use keep under the patent monopoly a subject to which the monopoly no longer applied."

Applying these principles to restrictions regulating the price of patented articles on resale, Justice White says, in the principal case, that the power to make such restrictions "in derogation of the general law was not within the monopoly conferred by the patent law and that the attempt to enforce its apparent obligations under the guise of a patent infringement was not embraced within the remedies given for the protection of the rights which the patent law conferred."

Referring to the general question of the right of a vendor to fix the price at which an article may be re-sold, the Court holds that the decisions of the Supreme Court have determined that such restrictions are contrary to public policy and void. Bobbs Merrill Co. v. Straus, 210 U. S. 339; Dr. Miles Medical Co. v. Park, 220 U. S. 373; Bauer v. O'Donnell, 229 U. S. 1; Strauss v. Victor Talking Machine Co., 243 U. S. 490.

It appears therefore that a patentee under his monopoly has no greater right than any other vendor to impose restrictions on the subsequent use or re-sale of such article which are in restraint of trade or against public policy.

Whether the public policy declared by the Court to be violated by price-fixing restrictions is a wise policy is still another question and a much debated one. However, such a question is for Congress and not the courts to decide. On this point it is interesting to note the comment of Justice Brandeis in his concurring opinion. The learned Justice says:

"Whether a producer of goods should be permitted to fix by contract, express or implied, the price at which the purchaser may resell them, and if so, under what conditions, is an economic question. To decide it wisely it is necessary to consider the relevant facts, industrial and commercial, rather than established legal principles. On that question I have expressed elsewhere views which differ apparently from those entertained by a majority of my brethren. I concur, however, in the answers given herein to all the questions certified, because I consider that the series of cases referred to in the opinion settles the law for this Court. If the rule so declared is believed to be harmful in its operation, the remedy may be found, as it has been sought, through application to the Congress or relief may possibly be given by the Federal Trade Commission, which has also been applied to."

A. H. R.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW—PUNCTUATION AS GUIDE IN INTERPRETATION.—In *Hutton Tax Collector v. McCleskey*, 200 S. W. 1032, decided by Arkansas Supreme Court, it was held, that the use of a semicolon in a constitutional provision is of minor benefit in interpreting its meaning.

This case concerned the validity or not of a proclamation by the Governor of Arkansas declaring remission of penalties for delinquencies in assessment of taxes for a certain year,

the proclamation distinguishing between unintentional and willful failure by owners to make returns for that year. Also there was a general order by the state tax commission directing tax collectors to accept without penalty taxes from unintentional delinquents. However, the court treats only executive power under the constitution, there being no claim of existence of any statute vesting any such power in the tax commission. In this case the tax collector refused to accept taxes from a delinquent without payment of penalty, and the taxpayer sought by mandamus to compel acceptance of the tax without penalty. He had judgment in the lower court and appellant, tax collector, secured a reversal.

It being stated that the Governor's power depended on the constitutional provision referred to, this provision is quoted. This provision is as follows: In all criminal and penal cases except those of treason and impeachment, the governor shall have power to grant reprieves and commutations of sentence and pardon after conviction; and to remit fines, etc. The court then speaks of the provision, the contention being advanced by appellant, that the power granted was remission of fines and forfeitures and to grant reprieves, commutations and pardons in penal cases.

It is said: "Punctuation is generally the least reliable guide to the true meaning of a sentence and should be given controlling effect only when other tests fail. The manifest design of the framers of the constitution was to limit the power to pardon for crime and remit fines and forfeitures, to criminal and penal cases, after conviction of crime or judgment for the imposition of fine or forfeiture, and not to allow its application to penalties and forfeitures civil, remedial and coercive in their nature. This is clearly indicated in another provision of the constitution which expressly declares that 'No power of suspending or setting aside the law or laws shall ever be exercised except by the general assembly.' The effect of a general amnesty such as is attempted would operate as a suspension of the law."

ALIEN ENEMY—RIGHT TO SUE IN OUR COURTS.—In *Arndt-Ober v. Metropolitan Opera Company*, 169 N. Y. Supp. —— it was held in Appellate Division of New York Supreme Court that a subject of Germany actually residing in New York and guilty of no misconduct may maintain an action in its courts.

The plaintiff in this case is an opera singer by profession. She came to this country in November, 1913, and has lived here ever since, except that she made two trips to Europe in the intervening four years, but has maintained a continuous residence in the borough of Manhattan during the entire time, and a summer home in the Adirondacks where a child was born to her in 1916. She resides here with her husband.

The court discusses the "Trading with the Enemy Act," and the president's proclamation of war defining who are to be deemed alien enemies. These are declared to be "all natives, citizens, denizens or subjects of Germany being males of the age of fourteen years and upwards who shall be in the United States and not actually naturalized," and the proclamation declares that these shall be accorded the consideration due to all peaceful and law-abiding persons, provided they conduct themselves as such.

The opinion, concurred in unanimously cites much English authority to the effect that alien enemies are aimed at and pointed out by international law and that nationality is not the test, but instead the place where one carries on his business. Thus English ruling says that "an Englishman carrying on business in an enemy's country is treated as an alien enemy in considering the validity or invalidity of his commercial contracts."

Even "an alien enemy's wife resident in the United Kingdom and duly registered under the Alien's Restriction Act could maintain an action in the courts of England for the purpose of asserting her individual rights, notwithstanding that her husband is an alien enemy as being a subject of Austria-Hungary or that he is abroad and probably engaged in fighting against this country."

The question has been noted in many of our courts and even passed on adversely to the views presented by the New York court and the opinion in the instant case by Shearn, J., is a valuable contribution to the law on the question considered.

In answer to the contention that residence as used in the Trading with the Enemy Act means legal residence or domicile and not residence as ordinarily understood, it is said that "the Trading with the Enemy Act was drafted in the light of the common law as announced by the greatest authorities in this country and in England and its purpose was in part to carry out the public policy of preventing aid to the enemy. If it had been intended to base the test of right to sue upon na-

tional instead of residence in enemy territory, such a change in the policy of the law would have been indicated by appropriate words."

PUBLIC CHARITIES—NO LIABILITY FOR NEGLIGENCE OF NURSE A RULE OF PROPERTY IN PENNSYLVANIA.—*Patterlini v. Memorial Hospital Assn.*, 247 Fed. 639, decided by Third Circuit Court of Appeals, holds in a diversity of citizenship case, that a federal court, if for no other reason than that of comity, should follow decision in Pennsylvania as to non-liability of a hospital association for the negligence of a nurse, because this has become a rule of property.

The question of decision in tort cases becoming a rule of property seems somewhat latitudinarian. It appears not to have been regarded in states where there was no statutory rule, say in fellow servant cases, when the Federal courts were exercising their independent judgment.

After citing many Pennsylvania cases in unbroken line denying right of recovery against a public charity for negligence of its servants it is said:

"During the 30 years that have elapsed since the earlier decision, many public charities have been founded, enlarged, or endowed by gifts, bequests or state appropriations. The founders and donors have had the solemn sanction of the state's most authoritative court that on such public charities should not be imposed legal liability for the negligence of those employed to administer them. Freedom from such liability wronged no one, because no one was bound to accept of their helpful service and it was no injustice to couple with the voluntary enjoyment of such service judicially decreed freedom of the charity from liability for negligence. Such being the settled law of Pennsylvania, a plaintiff in a case like this would have no ground on which to support a case in a state court of Pennsylvania. The jurisdiction of the Federal court given to non-residents against citizens of the local states, is to insure an impartial trial, not to create rights of action which citizens of the state in like condition do not have."

But the independent right of judgment in Federal courts often has ridden rough shod over the principle stated above.

But the court does not seem to abide with this principle according to its plain terms. When it was contended that the rule in Pennsylvania was not sound, the court said, in

effect, it would not go into the tempting field of discussion upon this subject, because a rule of property was established by Pennsylvania decision and "whatever the reasoning process by which it is reached, the conclusion commands itself to us."

Suppose it had not? If it had been as wishy-washy as is this opinion it hardly ought to be commended.

GUARD-RAILS ON BRIDGES—NECESSITY AND SUFFICIENCY.

There frequently rests upon railway companies the same duty with respect to the construction and maintenance of highway bridges and their approaches as is imposed by statute or otherwise upon counties and municipalities. This duty is generally expressed as requiring the erection and maintenance of such structures as the circumstances of the particular case require for the safety of travel thereon. Oftentimes it becomes a question of whether there should have been a railing or barrier, and also more often as to the strength and stability of the guard-rail.¹ Some of the decisions apparently leave the determination of these questions to the jury in each particular case but it is believed to be a correct statement of principle that even in those cases where the dangers of travel require the erection of guard railings, as is always the case on overhead bridges, and frequently on approaches thereto, such railings are only to protect the traveler from dangers arising from the usual and ordinary use of the roadway, and not from unusual or extraordinary uses thereof, and the determination of the question whether the railing is sufficient or not becomes a matter of law for the court.

While there is not a uniformity of decisions upon this question, some of the cases leaving these matters to the jury, yet there are quite a number of cases holding that

the rail is only intended to indicate the limits of the roadway, and to serve as a guide for the traveler; that it is intended to protect against only the dangers resulting from the usual and ordinary use of the roadway by the traveler, and not against those arising from unusual and extraordinary uses. In many of the cases of the latter kind the question has been decided to be one of law, and this is believed to be the correct rule.

A number of leading cases in several different jurisdictions which support this view are hereafter referred to and digested.

In *Wasser v. Northampton County* (Pa.),² the plaintiff was injured when his automobile, driven at a speed of from 20 to 25 miles per hour, ran through a guard-rail and over an embankment. A compulsory non-suit was entered in the lower court, which was affirmed by the Supreme Court. The latter court, in discussing the kind and character of guard-rail, lays down the rule as follows:

"There is no hard and fast rule as to the kind and character of a guard rail or barrier to be erected so that the highway may be deemed reasonably safe for the ordinary needs of travel. Public roads are intended for ordinary travel; if they meet the requirements which their ordinary uses demand, the authorities in charge of them have performed their duties under the law, and cannot be made answerable in damages for extraordinary accidents occurring on them. *Hey v. Philadelphia*, 81 Pa. 44, 22 Am. Rep. 733. Township officers are not bound to anticipate and provide against the happenings of accidents under extraordinary circumstances."

In answering the contention that the guard-rail was defective in the sense that it was not strong enough to prevent an automobile running at high speed from going over the embankment, the court says:

"It has never been declared to be the law in this state that a township must erect guard-rails or barriers, at points where the public highway runs near an embankment, so strong as to stop an automobile running

(1) 15 Am. & Eng. Enc. of Law (2nd ed), 426-7.

(2) 94 Atl. 444.

at the rate of 25 miles an hour. To do this would require the building of solid walls of masonry, the expense of which would be a very onerous burden for any township to bear in a rural community. The law does not contemplate the building of such a barrier or guard by counties, or townships, in county districts, and the proper and ordinary uses of the highways in such communities do not demand this extraordinary protection to the traveling public."

In McCain v. Garden Grove,³ in affirming a directed verdict in favor of the defendant, the court noted that the railing of the bridge was about $2\frac{1}{2}$ feet high, and that it might be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided, but held that defendant was not an insurer against accidents, further saying:

"It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended."

The steering gear of plaintiff's automobile becoming out of order, he lost control of the car; which turned out of the roadway proper and struck a temporary board fence along the side of a bridge. Then fence failed to hold the car, and it fell about 35 feet, causing plaintiff's injuries, for which he sued. The lower court dismissed the complaint, which was affirmed in the Supreme Court. After disposing of a number of authorities by showing that in each case cited the plaintiff was allowed to recover because his injuries were due to defects in the street or bridge while the use to which it was being put by the person was the ordinary and reasonable use for which it was intended, the court said:

"In the case before us it is clear that for all ordinary uses of the street reasonably to be anticipated, it was kept in a safe condition, and that if appellants' car had been equally fit for its intended purposes the accident would not have happened. The

defect in the car itself was plainly the proximate cause of the injury. The breaking of the railing was a mere condition. It could not reasonably be anticipated that a car, by reason of its own defects, would be driven over the curb, across the walk for pedestrians, and through the wooden railing at the side of the street. To hold the municipality liable in such a case would be to make it an insurer against every accident on its streets—in effect an insurer of the tractability of every team and automobile driven on its streets. ***"

"The decisions of this court in Teater v. Seattle, 10 Wash. 327, 38 Pac. 1006, and Dignan v. Spokane County, 43 Wash. 419, 86 Pac. 649, are in harmony with the decisions above discussed. In each of those cases, it is true, was involved the excessive force of a runaway team. Such a contingency, however, is no more extraordinary nor less to be anticipated than the eccentricities of an unmanageable automobile."⁴

In an action to recover damages for the death of a person claimed to have resulted from the want of a sufficient barrier along the bank of a river, it appeared from the evidence that there was a fence at that point made of posts about a rod apart, with two wires on them. In affirming a judgment sustaining a demurrer to the complaint, the court said:

"The circumstances of the case indicate that either the team or the wagon of the deceased came in contact with a fence post of ordinary size and strength and broke it. The real question presented by the facts of this case is whether the township trustee was bound to take notice that the fence was an insufficient barrier. In most cases, and under ordinary circumstances, it would seem that such a fence would be an ample warning to keep persons driving along the road from running off the bank. It would seem that horses under ordinary circumstances would be checked by it until they would see and avoid the danger. What impelled Dougherty's horses to rush over and break down the fence is a mystery wholly unexplained by the evidence. The township trustee was not bound to guard against all possible contingencies, all improbable conduct, but only against such dan-

(3) 83 Iowa 235, 48 N. W. 1031, 12 L. R. A. 482.

(4) Swain v. City of Spokane (Wash.), 162 Pac. 991.

gers as he was notified of. There would seem to be, in reason, a distinction between defects in the traveled way itself, which must be encountered by persons traveling over it, and those dangers which arise merely from the proximity of cuts, wash-outs and pitfalls. Township authorities may well be held to much more strict performance of their duties in maintaining the safety of the traveled track than in providing against the more remote contingency of dangers to be encountered by those who leave it, and go into unsafe places not prepared or intended for travel."⁵

"The county is obligated to keep its highways in a reasonably safe condition for ordinary travel only, not so that it may insure protection against its use in an extraordinary or unusual manner. * * * While the stringers had decayed somewhat, and some of the planks had warped, owing to the action of the elements, yet one could safely drive or ride over it with any of the carriages and wagons in common use when driven at an ordinary speed, and in the ordinary manner. * * * Nor is it necessary in order that the bridge may be in a reasonably safe condition that the stringers be perfectly sound, or that the planking be nailed fast to the stringers."⁶

In a number of cases, where the railing has been broken in collision with a horse or automobile, it has been held that even if the railing was insufficient or defective, this was not the proximate cause of the accident.

Plaintiff was driving a horse across a bridge over a railroad, when the horse suddenly fell against the railing, broke it down and plaintiff was injured. It was contended that the defendant was negligent in not providing the bridge with sufficient railings, while the defendant contended that it was without fault, and that the alleged defects in the railing were not the proximate cause of the accident. The court directed a verdict in favor of the defendant. In affirming the action of the lower court, the Supreme Court said:

(5) McFarland v. Emporia Township (Kan.), 53 Pac. 864.

(6) Dignan v. Spokane County (Wash.), 86 Pac. 649, citing with approval and following the case of Teater v. City of Seattle, 10 Wash. 327, 38 Pac. 1006.

"To entitle plaintiff to recover it must be shown that the injuries of which she complains were the natural and proximate result of the alleged defects in the bridge. West v. Ward, 77 Iowa 334, 42 N. W. Rep. 309, and cases therein cited. Under the evidence submitted we do not think that is a matter about which there can be any controversy. The horse which Miller was driving fell because it was diseased, or not properly harnessed and driven. The width of the bridge and the condition of the railing had nothing to do with its fall and death. Had it not fallen, the accident would not have occurred. The railing of the bridge was about 2½ feet high, and it may be true that, had it been of sufficient height and strength to bear the weight of the horse, the accident would have been avoided. But defendant was not an insurer against accidents. 2 Dill. Mun. Corp., section 789; Raymond v. City of Lowell, 6 Cush. 524. It was its duty to provide for the use of the bridge in the usual manner, and to guard against ordinary contingencies, or those which might be reasonably apprehended. It was its duty to provide railings of sufficient height and strength to prevent horses and other animals from walking off at the side, and to resist any weight and pressure which would be applied under ordinary circumstances; but it was not its duty to provide a railing which would successfully resist the weight of a horse of ordinary size precipitated suddenly against it. * * * We conclude that the condition of the railing and the narrowness of the bridge were not the proximate cause of the injuries sustained by plaintiff."⁷

In Mason v. County of Spartanburg,⁸ plaintiff alleged that his horse, becoming frightened at a hole in the highway, threw him off a bridge and down an embankment by reason of want of repair and improper construction of the bridge and its abutments. According to plaintiff's testimony, while attempting to cross a bridge over a creek in a buggy, with his wife, the horse, as he put his forefeet on the bridge, became frightened by a large hole under the bridge, and backing, threw the buggy with its occupants over the edge of the causeway, the approach to the bridge and the

(7) McClain v. Garden Grove, *supra*.

(8) 40 S. C. 390.

timbers that formed the edge of the causeway, being rotten, gave way, and these timbers, together with the rocks that had been thereby held in place, rolled down upon plaintiff, broke his leg, and otherwise injured him.

The plaintiff was non-suited in the lower court, and on appeal to the Supreme Court this judgment was affirmed on the ground that from the evidence it appeared that the injury was due not to the defect in the bridge but to the fright of the horse.

Where a team of horses from some unknown cause became frightened and ran away, going over an embankment at the terminus of the street where there were no barriers, it was held that although it might be negligence not to have the barriers, yet such negligence was not the proximate cause of the accident, the court saying:

"Mere concurrence of one's negligence with the proximate and efficient cause of the disaster will not create liability. But for the escape of the horses from the control of the party in charge, the accident would not have happened. For that escape defendants of course were not liable."⁹

Plaintiff's horse, becoming frightened by a piece of timber lying near the bridge for the purpose of repair, backed the plaintiff off the bridge, injuring her. In sustaining the lower court in granting a non-suit, the Supreme Court held that there was no material evidence that the absence of the bannister or railing was the proximate cause of the injuries.¹⁰

It is not always considered necessary to have a railing of any kind. A case illustrative of this is *Teater v. City of Seattle* (Wash.).¹¹ This was an action for damages to a team which ran away and ran off a bridge upon which there was no railing. The basis of the action was that the city was negligent in failing to have a railing on the bridge. It appeared from the evidence that the team was under such headway that they

could not make the turn to go over the bridge. From an order of non-suit, appeal was taken to the Supreme Court of the state. In sustaining the non-suit, the court said:

"It further fairly appears by the plaintiff's case that the bridge, at the point in question, was in a reasonably safe condition, and that the accident was due to the fact that the horses were unmanageable, and were under a full run at the time of the accident. The absence of a guard-rail does not necessarily infer negligence in all cases, and there is scarcely a possibility that a guard-rail would have prevented the injury in this instance. Under these facts we think the non-suit was properly granted. The city is not an insurer of the safety of its streets, but is only required to keep them in a safe condition for ordinary travel."

So, also, is *Leber v. King County* (Wash.).¹² This was a suit to recover damages for personal injuries received when plaintiff's team fell down a steep precipice adjacent to the roadway. The only negligence relied upon was a failure of the county to maintain a railing or barrier on the side of the road next to the declivity. Upon demurrer the suit was dismissed. On appeal to the Supreme Court the judgment was affirmed. The court held that the duty to erect barriers was not an absolute one, and that the law did not require it unless the danger was unusual. In its opinion the court uses the following language:

"Here we have a road graded and in repair, 15 feet wide, which is wide enough for all ordinary travel, unless it be in the populous centers of the state. We think it will require no argument to make plain the act that here there was no extraordinary condition or unusual hazard of the road. A similar condition is to be found upon practically every mile of hill road in the state. The same hazard may be encountered a thousand times in every county of the state. Roads must be built and traveled, and to hold that the public cannot open their highways until they are prepared to fence their roads with barriers strong enough to hold a team and wagon when coming in violent contact with them,

(9) *Thubron v. Dravo Contracting Co.* (Pa.), 86 Atl. 292.

(10) *Brown v. Laurens County*, 38 S. C. 282.

(11) 38 Pac. 1006.

(12) 124 Pac. 394.

the condition being the ordinary condition of the country, would be to put a burden upon the public that it could not bear. It would prohibit the building of new roads, and tend to the financial ruin of the counties undertaking to maintain the old ones. The unusual danger noticed by the books is a danger in the highway itself."¹³

It has been held in one case that the driver of the car was guilty of contributory negligence preventing a recovery.

"The guard-rail gave notice to the driver of the automobile that the place was dangerous, and, with this notice before him, it was his duty to avoid that danger by driving his car upon the roadway proper, and not take the chances of a test of strength between a rapidly speeding automobile and a lightly constructed guard-rail, sufficient to guard against accidents, resulting from the ordinary uses of the highway, but insufficient to stand such a test of strength. In this view of the case we are also of opinion that the driver of the car was clearly guilty of contributory negligence."¹⁴

H. O'B. COOPER.

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(13) See to same effect *Auberle v. City of McKeesport (Pa.)*, 36 Atl. 212.

(14) *Wasser v. Northampton County (Pa.)*, 94 Atl. 444.

the state's immunity from suit plaintiff had no remedy by judicial review. No relief was asked against the state guaranty fund. Held, that the action was not one against the state, within Const. Amend. 11, providing that the judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state, as an officer of a state may be delinquent, without involving the state in delinquency.

Action for the sum of \$5,235.60, with interest, for the failure of defendant in error Lankford to perform his duty as bank commissioner of Oklahoma, in consequence of which plaintiff in error sustained loss in the amount stated. Southwestern Surety Insurance Company, an Oklahoma corporation, was surety on the official bond of Lankford.

Defendants, defendants in error here, moved to dismiss the action on the ground of want of jurisdiction in the court, the action being "one against the state of Oklahoma without its consent, in violation of the Eleventh Amendment of the Constitution of the United States."

The court granted the motion, reciting that it was upon the ground stated and that the question of jurisdiction was alone involved in its decision, and subsequently allowed a writ of error to review that question only.

Plaintiff in error (we shall refer to him as plaintiff) is a citizen of the state of Massachusetts. The defendants in error are citizens of the state of Oklahoma.

The petition of plaintiff is, in outline, as follows:

Lankford, in March, 1911, then being bank commissioner of Oklahoma, and again in March, 1915, entered into official bonds with the insurance company as surety in the sum of \$25,000 for the faithful performance of his duties as required by law.

On October 11, 1913, the Farmers' & Merchants' Bank of Mountain View, Okla., a domestic banking corporation under the control and supervision of Lankford as bank commissioner, for value received, executed and delivered to plaintiff a certificate of deposit for the sum of \$5,066.66, with interest at 3 per cent.

February 20, 1915, Lankford, as bank commissioner, took possession of the bank, and of its assets because of its insolvency. Thereupon plaintiff indorsed the certificate to one Martin for collection, who presented the same to Lankford for payment. Payment being refused, Martin reindorsed the same to plaintiff. Under the terms of the bonds given by Lank-

STATE—IMMUNITY FROM SUIT.

Submitted Dec. 18, 1917. Decided Jan. 28, 1918.

Johnson v. Lankford et al.

38 Sup. Ct. 203.

In an action against a state bank commissioner and his surety, the petition charged the commissioner with dereliction of duty under the laws of the state, consisting of continuous overlooking of violations of the law by bank officials, whereby a bank was brought to insolvency, and knowing of the depletion of its assets, and of the reduction of its reserves, and not requiring their repair, and further alleged that, after taking possession of the bank, the commissioner groundlessly refused to pay a certificate of deposit held by plaintiff from the available resources of the bank or the state guaranty fund, and so interpreted and enforced the laws of the state as to deny plaintiff the equal protection of the laws, and deprive him of his property without due process of law, and that because of

ford it was his duty as commissioner to pay the certificate of deposit at the time it was presented to him. By refusal to so pay it, and his refusal afterward to pay upon the demand of plaintiff, he, Lankford, grossly and entirely failed to perform his duty, and being informed of the conditions of the bank and having means of knowledge he allowed the persons in charge of it to squander its assets so as to damage plaintiff in his right to compel payment from the bank. He, Lankford, also failed to exercise proper care and supervision in that before the making of the certificate of deposit and thence continuously up to the time he took possession of the bank, with full knowledge of the situation, he permitted the persons in charge of it to conduct it while its reserve was less than that required by law, and failed to take possession of it for the purpose of enforcing the law, or to do anything else adequate and requisite in the premises. He also permitted it while insolvent to make excessive loans and overdrafts in violation of law. And, knowing that it was in the hands of incompetent and inefficient persons, he allowed it to be controlled and managed by them inefficiently and incompetently and without economy, to the great damage of its assets, and plaintiff thereby was deprived of all opportunity of recovering the amount of his certificate out of its property.

Lankford failed to make the visits to the bank which the law of the state required him to make or exact the reports which the law required him to exact. He permitted it to reduce the funds which the law required it to have and failed to notify it of the deficiencies or to require it to repair them.

It was his duty to have taken possession of the bank, but he delayed to do so until February, 1915, when its assets were so squandered and depleted as to be insufficient to pay plaintiff's claim. He knew of the violations of law by its officers and of its insolvency.

It was his duty after he took possession to pay plaintiff's claim but he arbitrarily and capriciously refused, in violation of law and his bonds, and there was no cause whatever for him to have questioned the certificate as a valid claim against the guaranty fund of the state, which was available under the law of the state for the payment of claims against the bank.

The laws of the state have been so interpreted and enforced by him as to deny plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States and he has exercised this power so arbitrarily and capri-

ciously that other depositors of the same class and condition of plaintiff have been paid out of the available cash resources of the bank and the guaranty fund, and because the state is immune from suit plaintiff has no remedy by judicial review and Lankford, acting for the state as bank commissioner, has deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by illegally preferring other depositors to plaintiff, thereby breaching the obligation of his bonds.

By failure to perform the promises made for the benefit of plaintiff in the bonds, he has been damaged by defendants in the sum of \$5,235.60, on February 20, 1915, together with 6 per cent interest thereon, amounting, August 20, 1915, to the sum of \$5,392.67.

Plaintiff was without knowledge of the delinquencies of Lankford and the condition of the bank and, without fault on his part, allowed the moneys represented by the certificate to remain in the bank after the same became due.

Judgment was prayed for the amounts above specified.

Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the court.

Whether the District Court had jurisdiction was necessarily to be determined by reference to the case made by the petition. Hence we have given it at some length, omitting repetitions. It will be observed that the basis of the action is the neglect of duty of Lankford as bank commissioner, by which plaintiff has been damaged to the amount of his certificate of deposit. The insurance company has been made a party defendant because it has guaranteed the faithful performance of his duties, a statute of the state, it is contended, making it liable. Whether the contention is tenable or whether the petition or the case is defective in any particular we are not called upon to say. Upon neither question was the judgment of the District Court defensively invoked. The sole question for our consideration then is whether the cause of action stated is one against the state of which the District Court has no jurisdiction.

There is certainly no assertion of state action or liability upon the part of the state, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his willful or negligent disregard of the laws of the state, and it is

because of this his surety is charged with liability, it having guaranteed his fidelity.

We think the question, therefore, should be answered in the negative; that is, that the action is not one against the state. To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the state, is state action, identifies him with it and makes the redress sought against him a claim against the state and therefore prohibited by the Eleventh Amendment. Surely an officer of a state may be delinquent without involving the state in delinquency, indeed, may injure the state by delinquency as well as some resident of the state, and be amenable to both.

The case is not like *Lankford v. Platte Iron Works*, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the state had a title and which it administered through its officers. Any demand upon it was a demand upon the state and a suit to enforce the demand was a suit against the state, necessarily precluded by the purpose of the law.

The case at bar is not of such character. Its basis is Lankford's dereliction of duty, a duty enjoined by the laws of the state, and the dereliction is charged to have been continuous, overlooking violations of the requirements of law by the bank officials by which it was brought to insolvency, knowing of the depletion of its assets, knowing of the reduction of its reserves, and not requiring their repair. A further dereliction is charged after Lankford took possession and such arbitrary conduct and preferences that plaintiff's claim was subordinated to other claims of like character.

The present case finds example in *Hopkins v. Clemson College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243, where the college was held liable for acts of trespass upon private property, and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a "high attribute of sovereignty—a prerogative of the state itself—which cannot be availed of by public agents when sued for their own torts." And it was further said, "The Eleventh Amendment was not intended to afford them (public agents) freedom from liability in any case where, under color of their office, they have injured one of the state's citizens." And a distinction was marked between such acts and such as affect the state's political or property rights.

One charge in the petition will justify special comment. It is that the enforcement of the laws of Oklahoma in the matters complained of was and is solely through and by Lankford as bank commissioner and that he so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and to give to "other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage." And also it is alleged that Lankford's conduct in that particular deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The purpose of the allegations is not very clear. They might be considered as intended for emphasis of the wrongful conduct of Lankford; but they seem to be made more of than this in the argument of counsel, and we are left in doubt whether they are pleaded as independent grounds of recovery or only as elements with other grounds. It is somewhat impossible to regard them as the former, for no special relief is asked on account of them. They represent completed acts the injury of which has been accomplished, the plaintiff losing by them access to the guaranty fund or, its security, and hence Lankford is charged with personal liability. But no relief, as we have said, is prayed against the fund. If it were, *Lankford v. Platte Iron Works*, *supra*, might apply.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.

NOTE.—State Officer Not Immune from Suit Charging Neglect of Duty.—In the instant case there is no question of any claim that an officer was acting under invalid authority as was the case of *Louisville & N. R. Co.*, 63 Fla. 491, 58 So. 543, 44 L. R. A. (N. S.) 189. Nor is any consideration given to cases where in a suit against an officer claiming a right to charge fees, because the state has no pecuniary interest in such a suit as in *Ex parte Fitzpatrick*, 171 Ind. 557, 86 N. E. 964. Nor where it is sought to compel a board to perform a ministerial duty. *Granville County Bd. v. State Bd. of Education*, 106 N. C. 81, 10 S. E. 1002. Nor does this note consider suits seeking to restrain a board or officer from enforcing an alleged unconstitutional statute. *MERCHANTS EXCH. v. Knott*, 212 Mo. 616, 111 S. W. 565.

The question does touch that of judgment or discretion of an officer alleged to be negligent in the performance of a duty.

Thus it was held in *Wiest v. School District Or.*, 137 Pac. 1026, that a school district is not liable for a tort committed by directors of a school district and their clerk in entering on its

records their reason for dismissal of a teacher. This was where the district was sued. The court relied on *Board of Education v. Volk*, 72 Ohio St. 469, 74 N. E. 646, 18 Am. Neg. Rep. 581, wherein it was said: "The board is not authorized to commit a tort, to be careless or negligent, it does not in that respect represent the district and for its negligence or tort in any form, the board cannot make the district liable." The Wiest case said there can be no imputed wrong to the district for any torts of its officers and no fund given it can be diverted from the purpose intended by law to be devoted. The Volk case merely held there was no liability of the board "in its corporate capacity," nothing being ruled as to liability for negligence by individual members of the board.

Apart from the general claim of non-liability for acts governmental in character, there is the thought that school funds are not intended by law to be diverted for satisfaction of any damages caused by administrative officers. As to this see *Ernst v. West Covington*, 116 Ky. 850, 76 S. W. 1089, 63 L. R. A. 652, 105 Am. St. Rep. 241, 3 Ann. Cas. 882; *Weddle v. School Comrs.*, 94 Md. 334, 51 Atl. 289.

The fact that a school district is made by statute capable of suing and being sued as a quasi-public corporation does not carry the inference of liability for a trespass. *School Dist. v. Williams*, 38 Ark. 454. See as *contra*, *Redfield v. School Dist.*, 48 Wash. 85, 92 Pac. 770.

As to individual liability of an officer or director of a state board the case of *Morrison v. McLaren*, 160 Wis. 621, 152 N. W. 475, L. R. A. 1915E 469, proceeds on the theory that for acts of misfeasance there would be individual liability, but evidence did not show such.

In *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 31 Sup. Ct. 654, 55 L. ed. 890, 35 L. R. A. (N. S.) 243, the action was against an agricultural college, which received state aid and was invested with municipal powers. For its own corporate purposes it performed certain work, and in the doing of that it caused damage to an individual. In that case there is quite a full review of the question of the conferring of governmental authority as such and abortive attempts to do this.

It is said that: "Neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application —the wrongdoer is treated as a principal and individually liable for the damages inflicted."

If the officer acts under an unconstitutional statute, he may be restrained. *Ex parte Young*, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. ed. 714, 13 L. R. A. (N. S.) 932, 14 A. & E. Ann. Cas. 764, "because a void act is neither a law nor a command."

This case also says: "Neither public corporations nor political subdivisions are clothed with that immunity from suit which belongs to the state alone by virtue of its sovereignty."

But further it is said that: "As to state officers it has often been held that the exemption of the United States from judicial process does not protect their officers and agents, civil and military.

in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded or injured even by authority of the United States." *Eelknap v. Schild*, 161 U. S. 18, 16 Sup. Ct. 443, 40 L. ed. 601.

In *Herr v. Central Ky. Lunatic Asylum*, 97 Ky. 458, 30 S. W. 971, 28 L. R. A. 394, 53 Am. St. Rep. 414, it was said in a suit to abate a nuisance that: "If officers or agents of the state invade private right in a mode not authorized by the statute is invalid, unquestionably the person injured has a preventive remedy."

This excerpt passes by the question of liability as an individual for a tort, but it suggests that, if he acts in discretion he may not be deemed liable. If there is, however, no exercise of discretion but plain dereliction of duty, there is a different state of affairs. Such dereliction may be equivalent to willful trespass. C.

ITEMS OF PROFESSIONAL INTEREST.

DANGERS TO BE AVOIDED IN THE ORGANIZATION OF SO-CALLED "MASSACHUSETTS TRUSTS."

Our good friend, Mr. John H. Sears, of New York, who developed and expanded the idea of the so-called Massachusetts Trust in his work in Trust Estates as Business Companies, now comes out with a warning in the Corporation Journal that there is some danger involved in this form of business organization unless great care is shown. Mr. Sears says:

"A layman does not have a wide enough technical education to enable him to determine under what conditions a trust can be created, how it should be framed in order to prevent liabilities of the shareholders and how it should be operated by the trustees and their agents. The case of *People v. Green*, 150 Ill. 513 illustrates how some businesses, at least, are limited to corporate form. A trusteeship must be framed with the greatest care and the business of it conducted by the trustees with an absolutely strict regard for technical requirements or the courts may hold an investor therein liable for all the debts and liabilities of the organization to the full extent of his private fortune. One ground for such liability might be that though the particular enterprise is called a trust it is in reality drawn in such a way as to constitute a partnership. In the case of *In Re Associated Trust*, 220 Fed. 1012, the United States District Court for Massachusetts ruled that the so-called "Massachusetts Trust" before the court was an unincorporated company within the meaning of the Bankruptcy Law because of certain provisions in the trust agreement providing for election of trustees.

In addition to the matter of properly drawing the papers for such an organization, its proper conduct so as to protect the holder of its shares or its certificates, largely rests upon the experience, character and ability of the trustees, guided by competent counsel. The agents of the trustees must also act within their powers. Incompetent or dishonest agents might incur liabilities beyond those contemplated.

"The liability of a corporate stockholder is automatically limited by statute to payment for its shares. When this has been done, he need no longer concern himself with the question of liability. On the other hand, a certificate holder in a trusteeship or common law company, through no fault of his own, may unexpectedly be subjected to liability to the full extent of everything he owns or may thereafter own if (1) through inexperience, inadvertence or lack of knowledge of the essential details, the instrument attempting to establish the trust or association is not properly drawn; (2) if the trustees fail to bring to the attention of the persons dealt with that they must look to the trustees or to the trust funds only for payment of contract obligations; (3) if the trustees fail to take out and maintain sufficient liability insurance to cover judgments for tort liability, or (4) if the trustees fail to conduct the business as a trust estate."

ANNUAL MEETING OF THE MISSISSIPPI BAR ASSOCIATION.

The next meeting of the Mississippi Bar Association will be held May first and second, at Jackson, Miss.

The president's address will be delivered by Hon. A. A. Armistead of Vicksburg; the annual address by Assistant U. S. Attorney General W. C. Fitts. Selected papers will be read by Mr. Julian C. Wilson, of Memphis, Tenn., and Mr. Jeff Truly of Natchez.

BOOKS RECEIVED.

Corpus Juris. Being a Complete and Systematic Statement of the Whole Body of the Law, as Embodied in all Reported Decisions. Edited by William Mack, LL. D., Editor-in-Chief of the *Cyclopedia of Law and Procedure*; and William Benjamin Hale, LL. B., Contributing Editor of the American and English *Encyclopedia of Law* and the *Encyclopedia of Pleading and Practice*. Volume XIII. New York. The American Law Book Co. 1917. Review will follow.

HUMOR OF THE LAW.

A lawyer and his wife on one occasion were discussing the tenet of the Swedenborgian faith, one of which is that the occupation which most interests us in this life will be our duty in the life to come. The good wife scouted the idea very much. Finally her husband suggested: "You don't know, I may have to practice law in heaven." "Of course," she says, "you know there are no lawyers in heaven."

Dignity is essential to the position of a judge upon the bench, and he should never descend to an encounter of wits with the lawyers before him, said Mr. Justice Holmes, of the United States Supreme Court, to a party of young law students recently, and he told this story:

A certain judge was presiding at the trial of a prisoner accused of unlawfully entering a residence and stealing a valuable clock. The evidence showed conclusively that the accused, who had been standing in the street, reached his arm through an open window and, seizing the clock, which was standing on a desk nearby, made off with it.

The attorney for the prisoner sought to harry the judge into some mistake that might be turned to his client's advantage.

"Your honor," he said, "we deny that the person of the prisoner entered and wrongfully took the clock in question. We admit that his right arm did; that it entered through the open window and feloniously seized the article. But this body was standing outside in the street, and we submit that it should not be punished for an offense committed only by the right arm."

"Very well, Mr. Lawyer," replied the judge with a smile as he made ready to outwit the attorney, "I will accept your view of the case. The body of the prisoner is discharged from custody, guiltless, to go whither it please him. But his right arm I sentence to the state penitentiary for a term of five years. Mr. Sheriff, take the convicted arm to the prison. And I rather think," he added, again addressing the lawyer, "that your client will be glad to accompany his arm."

"I hardly think that is necessary, your honor," replied the attorney, bowing low with mock humility as he turned to the prisoner and ran his hand under the man's coat. Then, turning to the sheriff, who stood by gaping in amazement, he said:

"Here, Mr. Sheriff, is your convicted prisoner!" and, with a furtive wink at the court, handed the sheriff his client's wooden arm!

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. Abatement and Revival—Lex Loci Fori.—Where action is brought in Texas on a judgment rendered in Indiana, from which an appeal is pending, and the right to sue thereon in Indiana is not shown, the action is governed in that respect by the laws of Texas.—Van Natta v. Van Natta, Tex., 200 S. W. 907.

2. Agriculture—False Branding.—Cotton seed meal is a "commercial fertilizer" and "fertilizer material" within Acts 1911, pp. 172, 173 (Park's Ann. Pol. Code, §§ 1778a, 1778e), giving purchaser remedy in damages for false branding and deficiency in value of any commercial fertilizer or fertilizer material.—Boston Oil & Guano Co. v. Williams, Ga., 94 S. E. 1041.

3. Alteration of Instruments—Detaching Part.—Where in the written contract between maker and payee it was agreed that the note might be detached from such contract, such detachment on the perforated lines is not an alteration.—Iowa City State Bank v. Milford, Tex., 200 S. W. 883.

4.—Filling Blanks.—Authority to co-obligor to "fill in" executed agreement for exchange of corporate stock in which were left blank obligee's name and numbers of shares of the respective stocks, did not authorize such co-obligor to interlineate "or \$2,700," creating an alternative obligation to deliver that sum or the stock.—Dozier v. National Borax Co., Cal., 170 Pac. 638.

5. Assault and Battery—Lawful Resistance.—One who is threatened with a mere assault and battery has as much right within reason to meet the force exercised against him with force as thus to repel a force which threatens a graver injury.—State v. Stansberry, Iowa, 166 N. W. 359.

6. Associations—Condition Precedent.—Provisions in constitution of association, organized to maintain telephone system, requiring members to offer stock for sale, first to the association, was a mere condition precedent, attached to the right to sell the stock, and not an unreasonable restraint upon the alienation of the stock, and was valid.—Aubuchon v. Aubuchon, Mo., 200 S. W. 684.

7. Attorney and Client—Admission to Bar.—A man of mature years and of good general reputation, who, as found by board of law examiners, has failed to conceive nature of duties of attorney, and has no proper conception of ethics of profession, having solicited business for member of bar, etc., should not be admitted to practice law.—In re Bowers, Tenn., 200 S. W. 821.

8.—Compensation of Assistant.—Knowledge by client that his attorney is being assisted by associate counsel will not establish client's ratification of employment of such counsel on his behalf, where rendition of assistance by such counsel was consistent with their employment by another interested litigation.—Young v. Fowler, Ark., 200 S. W. 813.

9.—Disbarment.—Practice of attorney in causing another to appear of record as bringing actions which are in fact brought and prosecuted by himself, while disapproved, held not sufficient ground for disbarment, where no one had been thereby misled, overreached, or prejudiced.—In re Hertz, Minn., 166 N. W. 397.

10. Banks and Banking—Notice.—Request to bank by partner in firm having checking account, and also liable on note discounted to it by firm, for statement of business, coupled with notice of intended dissolution, in light of practice of banks, was properly construed as request for status of firm's checking account only.—Bank of Greenvale v. S. T. Lowry & Co., W. Va., 94 S. E. 985.

11.—Evidence.—In action by depositor against bank to recover amount of drafts claimed by bank to have been deposited for collection merely, representing corn sold and shipped in railroad cars, evidence that cars also contained corn owned by others was not material.—Brigance v. Bank of Cooter, Mo., 200 S. W. 668.

12. Bills and Notes—Consideration.—Purchaser of land on contract, who made notes to the vendor, who in turn obtained a contract from the owner of the land, and on account of evil machinations of the vendor the land was lost, and there was no consideration for the notes, has no defense against a holder of the notes in due course, within Rem. Code 1915, § 3443.—Fisk Rubber Co. of New York v. Pinkey, Wash., 170 Pac. 581.

13. Bonds—Constitutional Law.—A bond executed under a statute afterwards declared unconstitutional is not necessarily void; the test of its enforceability being whether it is based on a consideration independent of the statute or some advantage has accrued to the obligors.—Love v. McCoy, W. Va., 94 S. E. 954.

14. Brokers—Dissolution of Firm.—Dissolution of a firm of brokers did not terminate a contract giving them the right to sell land for a certain commission, where their dissolution agreement expressly continued the business as

to the contract involved.—*Kendrick v. Hansen*, Cal., 170 Pac. 675.

15. Building and Loan Associations—Rate of Interest.—The word "premium," as originally used in building and loan statutes and contracts, contemplated a payment for use of money in excess of rate of interest agreed upon, and did not necessarily mean a payment for use of money in excess of highest legal rate of interest.—*Aetna Building & Loan Ass'n v. Harris*, Okla., 170 Pac. 700.

16. Carriers of Goods—Tariffs.—Services rendered by intersecting railroads in transporting gravel from plaintiff's gravel pit within city to point where plaintiff was building bridge within city were not switching services independent of line haul, so that one railroad was entitled to tariff rate fixed for line haul services per car of gravel, and not merely to switching rate.—*Cummings Sand & Gravel Co. v. Minneapolis & St. L. Ry. Co.*, Iowa, 166 N. W. 354.

17. Carriers of Live Stock—Allegata and Probata.—In action for damages to interstate shipment of live stock, where railroad company's liability was governed by Carmack Amendment as altered by Cummins Amendment of 1916, held, that plaintiff, having alleged company's negligence instead of relying on its common-law liability as insurer, must prove it as alleged.—*Robinson v. Bush*, Mo., 200 S. W. 757.

18. Burden of Proof.—Where shipper of live stock alleged that railroad company was guilty of negligent delay in transportation, shipper, while having burden of proving such negligent delay, need not establish it by direct evidence.—*Robinson v. Bush*, Mo., 200 S. W. 757.

19. Separation of Animals.—Where carrier of live stock undertook to erect a partition in a car so as to separate the animals, it must, regardless of the primary duty of erecting the partition, construct a reasonably safe one.—*Crow v. Bush*, Mo., 200 S. W. 762.

20. Chattel Mortgages—Conversion.—If the mortgagee converts all the property mortgaged, and the value exceeds the debt, he must account to the mortgagor for the excess, but if there is an actual deficiency he can demand nothing more of the mortgagor.—*Rentz v. Crosby*, S. C., 94 S. E. 1053.

21. Commerce—Employe.—That injuries to section hand in placing a hand car on the track preparatory to repairing the track occurred in interstate commerce did not aid the servant who was then injured, where the injury resulted from pure accident.—*Woods v. Cincinnati, N. O. & T. P. Ry. Co.*, Ky., 200 S. W. 616.

22. Contracts—Fraud.—Where one party to verbal contract assumes to reduce terms to writing and fraudulently embodies a different contract and states that writing contains substance of verbal contract, the other party, thereby induced to sign it without reading it, may plead such fraud in defense to recovery thereon.—*Vermont Farm Mach. Co. v. Ash*, N. M., 170 Pac. 741.

23. Public Policy.—An agreement of husband and wife, who had separated, that one of them would seek a divorce, and the wife would pay the costs, was void as against public policy.—*Edleson v. Edleson*, Ky., 200 S. W. 625.

24. Corporations—Capital Stock.—Corporation owning patent right and holding part of capital stock of another corporation issued to it in consideration of right to use patent, etc., may sell such stock and pay proceeds to operating company on condition of subsequent accounting, and such transaction is not ultra vires, or a gift of corporate assets.—*Howard v. Tatum*, W. Va., 94 S. E. 965.

25.—Corporate Name.—Corporation consenting to co-partnership's use of its corporate name, after sale of co-partnership's business and name to plaintiff corporation, might be restrained from unfairly and wrongfully interfering with plaintiff's use thereof and from use of deceptive methods to divert business from plaintiff.—*Twin City Brief Printing Co. v. Review Pub. Co.*, Minn., 166 N. W. 413.

26.—Expiration of Charter.—Where charter had expired without knowledge of the parties and a transfer of stock was made and new certificates were issued and pledged for the price, an assignee of the purchaser upon discovering the fact could demand a return of the consideration, but could not, at the same time, organize a new corporation and retain the assets and corporate name.—*Scott v. Davis*, Mo., 200 S. W. 723.

27.—Principal and Agent.—Where general manager of corporation engaged in grain and mule business in name of corporation purchased soft drinks, held, that corporation was not liable on theory that he acted within apparent scope of his authority.—*St. Louis Beverage Co. v. Planters' Grain Elevator, Mule & Feed Co.*, Mo., 200 S. W. 730.

28. Customs and Usages—Parol Evidence.—Lease which covenants against tenant's use of building's freight elevator except for freight cannot be overridden by parol evidence of contrary custom or usage established when lease was made.—*Follins v. Dill*, Mass., 118 N. E. 644.

29. Damages—Punitive.—Punitive damages should not be awarded in any case where the amount of compensatory damages is adequate to punish the defendant, but only where they are insufficient for that purpose.—*Hess v. Mariari*, W. Va., 94 S. E. 968.

30.—Special Damages.—An allegation that plaintiff by reason of injuries "had lost — months of time, to the value of \$—," is no allegation of special damages.—*Huntington Contract Co. v. Bush*, Ky., 200 S. W. 618.

31. Deeds—Fee Simple Estate.—Conveyance of land to one in trust for use of himself and brothers and sisters with survivorship on death without children surviving, until youngest child reached 21, to be then equally divided between children, gave grantee or trustee a fee simple, defeasible on his death without children surviving.—*Barton v. Chance*, Ga., 94 S. E. 1007.

32.—Incapacity to Contract.—Capacity to dispose of property is not inconsistent with a considerable degree of mental weakness, and survives capacity to do business generally, so long as there remains the capacity to understand the extent of one's estate and the effect thereon of his act and the claims which others may have.—*Leonard v. Shane*, Iowa, 166 N. W. 373.

33. Divorce—Appeal and Error.—Where evidence on motion for allowance for maintenance

of child pending suit for divorce was not brought up, and the pleadings on the motion were insufficient to disclose the issues, the court on appeal could assume that the trial court was in error in requiring temporary contribution from the husband.—*Edleson v. Edleson*, Ky., 200 S. W. 625.

34. **Easements—Prescriptive Use.**—Where defendants' predecessor in title gave plaintiff a passway over his land, and plaintiff and the public generally had used the entire way under claim of right for over 15 years, an easement in the way existed in favor of plaintiff.—*Powell v. Wines*, Ky., 200 S. W. 641.

35. **Eminent Domain—Spur Track.**—As service of spur track is denied to no industry which it is reasonably feasible for it to serve, use must be deemed public, although not of same quality as that of extension of main line of railroad.—*Menasha Woodenware Co. v. Railroad Commission of Wisconsin*, Wis., 166 N. W. 435.

36. **Equity—Laches.**—Generally the doctrine of laches does not require suit for fraud until full knowledge of the fraud is brought home to plaintiff, although he must be alert and diligent.—*Wendell v. Ozark Orchard Co.*, Mo., 200 S. W. 747.

37. **Multifariousness.**—Bill for removal of executors and for appointment of receiver to execute will was not multifarious, as each defendant executor had interest in effort to remove him.—*Brown v. Wilcox*, Ga., 94 S. E. 993.

38. **Executors and Administrators—Jurisdiction.**—Allegation in petition for letters of administration that petitioner is entitled under law to be appointed administrator, "being requested to do so by relatives" of deceased, does not negative existence of necessary jurisdictional facts, but would admit evidence of a selection by relatives under Civ. Code 1910, § 3943, subds. 3, 6.—*Wash v. Dickson*, Ga., 94 S. E. 1009.

39. **False Pretenses—Sufficiency of.**—Alleged pretenses need not be such as would deceive one of ordinary intelligence or caution, and it is sufficient that representations falsely assert existence or non-existence of fact with intent of procuring money.—*Sudnick v. Kohn*, W. Va., 94 S. E. 962.

40. **Fraudulent Conveyances—Antenuptial Agreement.**—If wife was innocent of and had no knowledge of fraudulent intent of husband, conveyance by him to her, pursuant to written antenuptial agreement in consideration of marriage, is not void as to creditors of husband.—*Armstrong v. Armstrong*, Wash., 170 Pac. 587.

41. **Oral Lease.**—Where an oral farm lease is transferred in fraud of creditors with knowledge of grantee, but before work or seeding is done on the farm, creditors of the grantor cannot reach crops raised by the grantee, nor are they subject to subsequent mortgages placed thereon by the grantor without grantee's knowledge or consent.—*Smith v. Dement Bros. Co.*, Wash., 170 Pac. 555.

42. **Gifts—Evidence.**—On issue as to gift of land to plaintiff by her father, the defendant, evidence as to amount of land owned by defendant at time of alleged gift and as to number of his children, in connection with showing of

contemplated division of property among children, was admissible.—*Deal v. Mosely*, Ga., 94 S. E. 1013.

43. **Highways—Dedication.**—Where language of grant dedicating right of way for state road was that road should "coincide" with highway running past grantor's residence, "coincide" meant to agree with.—*Bidwell v. McCuen*, Iowa, 166 N. W. 369.

44. **Negligence.**—Town cannot as matter of law be held free of negligence in leaving for years large, partly exposed stone in highway, within five feet of beaten path.—*Kadolph v. Town of Herman*, Wis., 166 N. W. 433.

45. **Husband and Wife—Presumption of Common Law.**—Where contract was assigned to plaintiff, married woman, in state of Illinois, she may maintain action thereon in her own name in courts of Missouri, Married Woman's Act entitling her to sue, regardless of the presumption that the common law which would have required suit in equity prevails in the state of Illinois.—*Coombes v. Knowlson*, Mo., 200 S. W. 743.

46. **Injunction—Installment Payments.**—The mere fact that the purchaser of cows owed part of the price, failed to pay the installments which were past due, and was insolvent gives no right to court of equity to enjoin purchaser from selling them or removing them from premises leased from the seller.—*Davis v. Kemp*, Ala., 77 So. 745.

47. **Insurance—Acceptance of Risk.**—The acceptance of a fire policy is equivalent to a declaration that a provision in the policy that insured was the sole owner was true, although insured never saw the policy or signed an application.—*Tiffany v. Queens Ins. Co. of America*, Mo., 200 S. W. 728.

48. **Accident.**—Where insured used considerable violence in removing automobile tire, and it came loose suddenly, causing him to stagger back, if this involuntary movement caused fatal injury to some vital organ, held, that death was accidental.—*Lickleider v. Iowa State Traveling Men's Ass'n*, Iowa, 166 N. W. 363.

49. **Actual Loss.**—Under fire insurance policy covering loss of rents during time necessary to restore premises to tenable condition, liability extended no further than to indemnify insured against actual loss.—*Chronicle Bldg. Co. v. New Hampshire Fire Ins. Co. of Manchester, N. H.*, Ga., 94 S. E. 1043.

50. **Cancellation of Policy.**—Where mortgage clause appointed mortgagee to receive proceeds on account of insured, and mortgagor's sale of property avoided policy, and conditions imposed by insurer to substitute purchaser as insured were not complied with until after loss and cancellation of policy, mortgagee could not recover.—*Longfellow v. National Fire Ins. Co.*, Kan., 170 Pac. 813.

51. **Contribution to Injury.**—That insured may have been negligent, and that such negligence may have contributed to his injuries, is no defense to an action on an accident policy.—*Lickleider v. Iowa State Traveling Men's Ass'n*, Iowa, 166 N. W. 363.

52. **Preliminary Expenses.**—Insurance company in process of organization before obtaining license held without power to assume indebtedness contracted by promoters, and persons advancing money for preliminary expenses had no claim against it.—*Reynolds v. Union Station Bank of St. Louis*, Mo., 200 S. W. 711.

53. **Subordinate Lodge.**—That fraternal organization was chartered by superior court of D. county, and had its principal office therein, notwithstanding by-law, held not to deprive superior court of R. county of jurisdiction of suit on its death certificate to member of subordinate lodge in R. county, after service on its local

officers.—Supreme Circle of Benevolence v. Smith, Ga., 94 S. E. 1034.

54.—**Total Disability.**—In action on accident insurance policy for total disability resulting from injury on a passenger train, evidence as to amount for which insured settled his judgment against the railroad on account of the injury, held too weak and remote to be admissible.—Fidelity & Casualty Ins. Co. of New York v. Mountcastle, Tex., 200 S. W. 862.

55. **Landlord and Tenant**—Implied Invitation.—Plaintiff's intestate, who went into defendant's building to get waste paper from floor, leased to a tenant who gave paper to anyone who would come there and take it away, was not clothed against defendant with any greater rights than tenant under whose implied invitation he came upon premises.—Collins v. Dill, Mass., 118 N. E. 644.

56. **Libel and Slander**—Instructions.—In an action for libel per se where no evidence of damages was tendered, plaintiff relying on presumption of damages, it was error to merely instruct that the amount of damages was subject to the discretion of the jury, without informing them that they should be guided by the circumstances and justice of the case.—Comer v. Advertiser Co., Ala., 77 So. 585.

57. **Libel and Slander**—Special Damages.—If published in writing or in print, words which tended to expose married woman and married man not her husband to aversion and disgrace, and to disseminate evil opinion of them, were libelous and actionable without evidence of special damages.—Craig v. Proctor, Mass., 118 N. E. 647.

58. **Literary Property**—Interpolations.—Under contract for production of musical play, held, defendant could obtain satisfactory interpolations elsewhere, although plaintiff had not been requested to furnish them and had refused or had furnished unsatisfactory ones.—Karczak Pub. Co. v. Shubert Theatrical Co., N. Y., 169 N. Y. S. 1.

59. **Malicious Prosecution**—Probable Cause.—Where the prosecutor discovered brands in lumber cut by plaintiff, and was advised by the county attorney and others that a prosecution would lie, there was probable cause for instituting a prosecution under Ky. St. § 1409, for secretly appropriating branded timber.—J. D. Hughes Lumber Co. v. Wilson, Ky., 200 S. W. 624.

60. **Master and Servant**—Accident.—Injury to employee while wading through water which had flooded employer's car works, whereby an old wound on his foot was infected, requiring amputation, was an "accident" within Workmen's Compensation Act (Gen. St. 1915, § 5896; Laws 1917, c. 226).—Monson v. Battelle, Kan., 170 Pac. 801.

61.—Assumption of Risk.—Where a foreman does not direct any certain number of men to put hand car on the track, and a servant with three others attempts to put the car on the track, the master is not chargeable with having furnished insufficient men.—Woods v. Cincinnati, N. O. & T. P. Ry. Co., Ky., 200 S. W. 616.

62.—Course of Employment.—Under Workmen's Compensation Act, compensation can be recovered where inability to labor is caused by pain resulting from injury received in accident arising out of and in course of employment.—Trowbridge v. Wilson & Co., Kan., 170 Pac. 816.

63.—Imputable Negligence.—Driver of loaned automobile, arrested for speeding, was not liable for negligence of his friend who had been riding with him, in running into woman with automobile on trip to central police station to deposit bail for driver's release.—Stoddard v. Fiske, Cal., 170 Pac. 663.

64.—Proximate Cause.—It cannot be said as a matter of law that the wearing of a jumper sleeve unbuttoned and dangling three or four inches from the arm, the catching of which on a cable resulted in servant's injury, was the proximate cause thereof or only an intervening agency.—McBride v. Hodges, Tex., 200 S. W. 877.

65.—**Respondeat Superior.**—In an action for injuries occasioned by automobile driven by a servant, it is immaterial that title to the car is

in defendant's wife, and that she pays the driver, where defendant has full dominion over the car and driver and furnishes the wife with the funds to pay all the servants.—Penticost v. Massey, Ala., 77 So. 675.

66.—**Respondeat Superior.**—Where a servant quarrels with a third person while acting for his master, and the quarrel ceases for an appreciable interval and the third person renewns the quarrel and is killed, the master is not liable, nor is the master liable if the servant is only ghting to serve his own personal ends.—Bryeans v. Chicago Mill & Lumber Co., Ark., 200 S. W. 1004.

67.—**Simple Tool.**—Handle of hand car to be used by one standing in such position that, if it should suddenly give way, user would be precipitated in front of moving car, is not a simple tool, of which a mere visual or external inspection by employer might suffice.—Ronconi v. Northwestern Pac. R. Co., Cal., 170 Pac. 635.

68.—**Workmen's Compensation Act.**—While constructing a sewer, a city is not engaged in an enterprise involving any element of gain or profit, and does not come within the terms or operation of the Workmen's Compensation Act (Gen. St. 1915, § 5900).—Redfern v. Eby, Kan., 170 Pac. 800.

69.—**Workmen's Compensation Act.**—The burden being on the master, who has rejected the Workmen's Compensation Act, to rebut the prima facie case arising from the fact of injury to a miner by a fall of slate, showing that the place was not reasonably safe, met by a counter-showing that the servant was also negligent and that his negligence contributed to the injury, does not exonerate the master.—Mitchell v. Swanwood Coal Co., Iowa, 166 N. W. 391.

70. **Mines and Minerals**—Option.—Stipulation by mining lessee to commence operation within year from date certain or pay for delay gave lessee an option to drill or pay, and failure to do either made oil and gas lease forfeitable at will of lessor.—Melton v. Cherokee Oil & Gas Co., Okla., 170 Pac. 691.

71. **Municipal Corporations**—Abutting Owners.—Ordinance prohibiting abutting owners from allowing snow and ice to accumulate on sidewalk in front of their property does not, traveler having sustained injuries by reason thereof, entitle city against whom traveler recovered to recover over against abutting owners.—City of Seattle v. Shorrock, Wash., 170 Pac. 590.

72.—**Governmental Capacity.**—A city health commissioner while supervising the removal of garbage, and a city commissioner while authorizing and providing for its removal, are acting in a public and governmental, and not in a private or corporate, capacity.—Montain v. City of Fargo, N. D., 166 N. W. 416.

73.—License for Jitney.—Where permit and bond cover jitney, such permit and bond cover specific machine, and surety is not released by renting of machine to another without surety's knowledge under Laws 1915, p. 227 (Rem. Code 1915, §§ 5562—37 to 5562—41).—McDonald v. Lawrence, Wash., 170 Pac. 576.

74.—Negligence.—Defendants who agreed to hold city harmless as result of their use of parking strip held not liable to city, pedestrian having recovered against it, for injuries claimed to have resulted in part from wire which defendants placed on parkway, unless they were negligent.—City of Seattle v. Shorrock, Wash., 170 Pac. 590.

75. **Payment**—Voluntary.—One who voluntarily pays money with full knowledge as to claim made cannot recover it back in absence of fraud or duress, although money was not actually due.—Pritchard v. People's Bank of Holcomb, Mo., 200 S. W. 665.

76. **Principal and Agent**—Misrepresentation.—Nonresident principals, who by misrepresentations of resident agent were induced to assign their interests in oil leases to him for nominal sum in expectation of his resale, after agent without their knowledge or consent took title and sold leases for much more than he paid, might maintain action against agent.—Helm v. Mickleson, Okla., 170 Pac. 704.

77.—**Novation.**—Had mortgagee's agent been authorized by her to collect from mortgagors note and mortgage, he could have done so only in money, and not by way of novation and substitution of new mortgage of purchasers from mortgagors.—*Hopkins v. Jordan*, Ala., 77 So. 710.

78. **Principal and Surety.**—Release.—Where infant purchaser of automobile made disaffirmance of sale and complete restoration of property, obligation on sale contract and note was discharged, and his sureties were released.—*Stanhope v. Shambow*, Mont., 170 Pac. 752.

79. **Railroads.**—Contributory Negligence.—Custom of flagging trains in neighboring village where deceased had lived could have no bearing upon his contributory negligence, where no offer was made to show that it was ever the practice to flag trains at place of accident, or that he was not acquainted with practice there obtaining.—*Knapp v. Northern Pac. R. Co.*, Minn., 166 N. W. 409.

80.—Injunction.—Where railroad company owned fee in strip on which its road was constructed, it could not be restrained from extracting oil therefrom, notwithstanding Rev. St. 1911, art. 1164.—*Crowell & Conner v. Howard*, Tex., 200 S. W. 911.

81. **Release.**—Consideration.—A debtor's payment of a liquidated amount presently due and to which he has no defense that can be urged in good faith or with color of right, is not itself a sufficient consideration to sustain creditor's release of other liquidated claims.—*Fidelity & Casualty Ins. Co. of New York v. Mountcastle*, Tex., 200 S. W. 862.

82. **Sales.**—Contract.—Where contract covered entire output of cotton linters from defendant's mill for a season, when operated at normal capacity, etc., defendant's delivery of estimated number of bales would not discharge it from liability for unexplained failure to operate the mill and produce normal output.—*Dawson Cotton Oil Co. v. Kenan, McKay & Speir*, Ga., 94 S. E. 1037.

83.—False Representations.—Where there was no testimony tending to show that plaintiff's agent who sold tractor had seen it or had any knowledge that it was not as capable of doing work as one borrowed by defendant, it cannot be successfully contended that the agent made representations to that effect, knowing them to be untrue.—*J. I. Case Threshing Mach. Co. v. Dyches*, S. C., 94 S. E. 1051.

84.—False Representation.—Where the patentee of a bleaching process represented to the owner of a tool handle factory that his process would bleach handles according to sample at a cost of less than 12 cents per dozen, and the process was secret, the representations were of fact, and not mere promises.—*A. Franck-Philips & Co. v. Hanna & Young Handle Co.*, Mo., 200 S. W. 718.

85.—Gift.—If deceased bought plaintiff an automobile in consideration of an agreement to come and live with her, there was a sale; and, where there was evidence thereof, it was proper to submit an issue as to whether there was a sale of the machine, as well as an issue as to its being a gift.—*Morgan v. Williams*, Ky., 200 S. W. 660.

86.—Redelivery.—Where seller of an automobile, required to deliver under Rev. Codes, § 5097, without agreement to deliver elsewhere, delivered at garage where car was at time of sale, which was seller's place of business, redelivery of car to such garage with notice thereof to seller constitutes restoration of the car in view of section 5098.—*Stanhope v. Shambow*, Mont., 170 Pac. 752.

87. **Specific Performance.**—Contract for Will.—A contract to make a will cannot be enforced against the widow of a party who married him without knowing of the existence of the contract without regard to her statutory rights, including all the personality. Code 1907, § 3763.—*Mayfield v. Cook*, Ala., 77 So. 713.

88.—Husband and Wife.—A contract between husband and wife in contemplation of continuance of a previous separation, having for its purpose the adjustment of respective property

rights, will be enforced in equity if fairly made and just.—*Edleson v. Edleson*, Kan., 200 S. W. 625.

89. **Telegraphs and Telephones.**—Delay.—That agent of telegraph company received message for transmission not knowing of closing hours of terminal office does not render company liable for delay, resulting from fact that terminal office was closed and receiving agent failed to inform agent of that fact.—*Diffenderffer v. Western Union Telegraph Co.*, Mo., 200 S. W. 706.

90.—**Sender and Sendee.**—The rule that a telegraph company is not liable to the sender on account of a purchase by the sendee through errors in a message has no application to an action by the sender who has been assigned the claim of the sendee.—*Western Union Telegraph Co. v. Love & Walters*, Tex., 200 S. W. 889.

91. **Tenancy in Common.**—Reasonable Time.—Where one co-tenant had in his hands rents collected, and failed to pay the taxes, and purchased at tax sale, his purchase was voidable only at the election of the other co-tenants to be exercised within a reasonable time.—*Stamps v. Frost*, Ky., 200 S. W. 609.

92. **Trust.**—Confidential Relation.—Where a father bought, from his son, who was a corporation employee, certain bonds with trust fund, the parental relation did not of itself operate to create such confidential relation between the son and the owner of the funds, as to charge him as involuntary trustee as to a stock bonus retained by him.—*MacDermot v. Hayes*, Cal., 170 Pac. 616.

93.—Joint Judgment.—In suit against two persons to follow a fund and impress it with a trust, where all the money was received by one defendant, it was error to give joint judgment against both as trustees.—*Glander v. Glander*, Wis., 166 N. W. 446.

94. **Vendor and Purchaser.**—Husband and Wife.—At time of trial of suit to recover homestead and cancel quitclaim deed executed by husband alone, husband and wife had right to pay defendant amount of husband's note given for part of purchase money to husband's vendor, husband never having made default, and defendant, after receiving quitclaim deed, and as part consideration, having paid husband's vendor amount of note.—*Clark v. Tulley*, Tex., 200 S. W. 605.

95.—Parol Gift.—In action by purchaser against donee in possession under claim of parol gift, donee's testimony that she had stated to attorney for donor and vendor in his presence that she had an interest in property and that she would not vacate was material on issue as to gift.—*Hudson v. Broughton*, Ga., 94 S. E. 1007.

96.—Rescission.—Suit by purchaser for damages equaling unpaid balance of purchase price, secured by deed of trust on purchased property, which the plaintiff asks to have canceled, is valid election to stand on the contract, and not suit for rescission.—*Wendell v. Ozark Orchard Co.*, Mo., 200 S. W. 747.

97.—Vendor's Lien.—To enforce vendor's lien against purchaser on theory that plaintiffs were to be paid part of purchase price as commission for selling land, amount agreed to be paid must have been part of purchase money and vendor must have so understood.—*Hendon v. Zirkle & Moore*, Ala., 77 So. 697.

98. **Weapons.**—Unlawful Carrying.—Defendant held not guilty of unlawfully carrying pistol handed him by another, who had borrowed it and was taking it home, and who took the weapon back shortly after he gave it to defendant to keep temporarily.—*Wallace v. State*, Tex., 200 S. W. 836.

Chandler v. Chandler, Ga., 94 S. E. 995.

99. **Wills.**—Corpus and Income.—Devise of real and personal property to executors and trustees to be managed for 20 years, with power of sale and duty to loan on security or invest moneys not needed for specified purposes, included not only the corpus, but the income.—*Grant v. Stephens*, Tex., 200 S. W. 893.

100.—**Child En Ventre Sa Mere.**—For beneficial purposes child en ventre sa mere at date of execution of will and born after testator's death will be considered both under the Georgia law and the common law as a child in being, and will take directly under devise to "children."—

Central Law Journal.

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IS THE QUESTION OF LEGAL ETHICS AN ECONOMIC QUESTION?

This question was answered affirmatively at the last meeting of the Alabama Bar Association by the report of its Central Council.

This is a startling admission for any representative agency of the bar to make. If it have any basis in fact it will be accepted with shame and with a set purpose on the part of every lawyer who loves his profession to correct conditions.

The idea that morality in its general aspect is largely an economic virtue had its first public exploitation in the legislative investigations set on foot a few years ago to find out why so many young women became so easily the prey of the white slavers. At that time, it will be remembered that the idea was bitterly resented and it was pointed out that many girls who "went wrong" had never been in financial difficulties and that there was as a rule greater immorality among the middle and wealthy classes, than among the very poor. The general conclusion was that sex morality was a question of education, environment and heredity, economic necessity being only a minor contributory cause.

Of course, it is quite possible, if one views the ethics of the bar as mere code of conventional rules, that economic necessity may constitute a very important factor in determining the causes for any alleged decline in professional morality, but that such necessity should be the controlling factor is quite unthinkable, and, if true, would constitute a reflection on the moral fibre of the men who enter the profession, or on the other hand, would prove that the standards of professional conduct are too severe and impractical under present conditions.

But, returning to the report of the Alabama Central Council, it is there said, after calling attention to a few cases where offending lawyers were disbarred by the court, that:

"After all, the number of disbarments must be relatively small as compared with the instances of malfeasance which must occur so long as the number at the bar is too great for many capable members to make a good living at law—a living at least as ample as that made by any skilled artisan in the neighborhood."

Realizing that this conclusion of the Council rests largely on proof of the existence of an economic crisis in the financial affairs of not a few, but of a large proportion, of practitioners, the committee refers to the reports of other bar associations and to discussions in the Educational Section of the American Bar Association since 1910. The report then goes on to say:

"It has been asserted by New York lawyers speaking before the American Bar Association that the average yearly income of a New York lawyer is only \$1000; and the Birmingham members of your council feel confident in asserting that the average professional income of the 370 lawyers recently listed by Mr. Alex. Troy, as practising the profession in Birmingham is nothing like so large as the average of \$1000 estimated for New York; whereas the regular wages of a Birmingham plumber is \$6 per day, and every coal miner or locomotive engineer can make at least as much in his calling."

It hardly needs any proof that there are too many lawyers. This fact is universally admitted. But there may be some hesitation on the part of many members of the bar in acquiescing in the deduction of the council's report that "the question of maintaining the purity of the bar is therefore primarily an economic question."

Admitting, however, that economic necessity is not an unimportant contributory factor in professional delinquencies, we are prepared to accept with some minor qualifications the suggested solution of the Council to restrict the number of lawyers entering the profession. On this point the report says:

"Our position is that the only solution of the problem is to reduce the numbers of the Bar in future by closely restricting the right to get in, and then in the lapse of time the temptation to malpractice will disappear, and an occasional disbarment will be sufficient to warn those who do wrong for the mere love of gain, to pursue their ambition in some other calling."

Accepting, as we do most heartily, the suggestion of the Alabama Central Council of the extreme desirability of raising the entrance requirements of applicants for admission to the bar, our hope for improvement in professional conduct is not based on any humiliating admission that thereby the mere "temptation to malpractice will disappear," but that thereby the men of weak moral fibre who now come to the ranks of practitioners will be discouraged from entering a profession where the emoluments of practice are only for those who make the most thorough intellectual preparation.

A. H. ROBBINS.

NOTES OF IMPORTANT DECISIONS

ATTORNEY AND CLIENT—STATEMENT BY ATTORNEY AS MALICIOUS ATTACK ON COURTS.—*Re Sherwood*, 103 Atl. 42, decided by Pennsylvania Supreme Court, shows that an attorney was disbarred for stating in a case removed to a federal court for prejudice, in diversity of citizenship, that "the five judges of the Luzerne (Pa.) Court are so prejudiced that Stough (his client) could not get a fair trial in our (State) courts." The judgment of the lower court disbarring him was reversed, because such statement was held to be privileged.

The Supreme Court ruled that the fact that the statement was made in a case in a federal court interposed no obstacle to the proceeding for disbarment, but it was said that the statement was privileged. The Court said that "what he said was spoken in the course of a judicial proceeding and was relevant and pertinent to the subject or cause of the inquiry." Is this true?

This statement was not in form argumentative. It was an unequivocal statement of something as a fact. As such a statement it

could not be accepted by the court to which it was addressed. It could not add a jot or tittle to what the court needed in the way of information for disposition of the cause before it. If that court gave it any value in this way, it exceeded its power. It, therefore, possessed no relevancy or pertinency to the subject or cause of inquiry before the court.

The Supreme Court thought that there was here a question of "bad taste" and such is not a test in this inquiry. But we think, that the rule that counsel act contrary to professional ethics, when they undertake to state facts as facts, instead of employing argument as argument, is based on something more than taste. It is unethical to do this, because it is usurpation of the role of a witness. It is the interjection of irrelevancy in a cause, and we think the Pennsylvania court failed to utilize an excellent opportunity to characterize — as it should have characterized—an abuse by counsel of a privilege conferred on attorneys in appearing for clients. Instead of doing away with this abuse, it helps to enthronize it.

MARRIAGE—ANNULMENT IN COURTS OF ANOTHER STATE FOR CAUSE NOT CONTRARY TO ITS POLICY.—The case of *Kitzman v. Kitzman*, 166 N. W. 789, decided by Supreme Court of Wisconsin, is quite remarkable for its many angles concerning its validity at the place of performance, regard for that validity in another State and conformity with policy in the latter State in an action for annulment being involved.

It appears that all the parties lived in Wisconsin and there made application for a marriage license. This being refused they went over to Minnesota where they obtained a license and there a ceremony of marriage was performed, they returning to Wisconsin the same day, and living together as man and wife. At the time the husband had been declared an epileptic from excessive drinking and a guardian was appointed for him. Wisconsin law provided that no insane person or idiot should be capable of contracting marriage, and Minnesota law forbade marriage where either party is epileptic, feeble minded or insane. The alleged wife brought an action in Wisconsin to confirm the marriage, the husband and his guardian being made defendants. The guardian denied validity of the marriage and asked for affirmative relief and that it be declared void. Plaintiff had judgment in the trial court, and this the Supreme Court reversed and gave the affirmative relief prayed for. The action begun by the wife was as by statute of Wisconsin in

cases where validity of marriage is denied or disputed.

The court said: "The trial court should have declared that the marriage ceremony * * * was against the prohibition of the Minnesota statute; was contrary to the public policy of that State; was entered into after concealment or misrepresentation of a material fact had induced the proper official of that State to issue a requisite marriage certificate, and that such violations of the public policy and statutes of Minnesota were of such nature that the pretended ceremony could create no matrimonial status entitled to be recognized as such within the public policy of this State, and said attempted marriage therefore should have been declared null and void."

It is to be stated also that the defendant husband was opposed to the defense set up by his guardian and wanted the Minnesota ceremony confirmed and the relationship of marriage continued. This was thought not to hinder the rendition of the decree that was made, because of the power of the State over the relationship, independently of the wishes of the immediate parties thereto.

If common law marriage is recognized in Wisconsin, the ceremony in Minnesota ought to have been deemed merely an incident and not material. And further, the proof manifest of an attempt to evade Wisconsin officers for their refusal to perform the ceremony ought to have accentuated the view that common law marriage should have its ordinary effect.

Furthermore, it was claimed that the husband was not an epileptic at the time the ceremony was performed. The lower court so found as matter of fact, and the court admits that epilepsy may not be permanent, but says it is a serious mental disease which may injure posterity. But Wisconsin law does not bar an epileptic from marrying, but only insane.

It seems to us, that this case ought to have been ruled on the theory of the parties being residents of, and domiciled in, Wisconsin, and the resort to Minnesota was matter more incidental than substantial. The husband and wife holding themselves out as married and desiring to continue so to do should have controlled, especially as there was no policy in Wisconsin avoiding marriage for epilepsy.

REMOVAL OF CAUSE OF ACTION—TEST IN SUITS UNDER FEDERAL EMPLOYERS' LIABILITY ACT AFTER VERDICT.—In Northern Trust Co. v. Grand Trunk Western Ry. Co., 118 N. E. 986, decided by Illinois Supreme Court, the interesting question arises as to

question of removability of an action from a state to a federal court, when raised upon motion to remove or upon arrest of judgment.

The declaration in this case stated a cause of action under State law and there being requisite diversity of citizenship it was subject to removal. Upon the trial it was not shown that plaintiff was engaged in interstate commerce, and the case remained as declared upon.

The court in speaking of a prior case in which a demurrer was interposed said: "In that case the question of the sufficiency of the declaration arose on a motion in arrest of judgment, which was overruled by the trial court. The declaration alleged that the defendant has engaged in interstate commerce, but did not allege that the plaintiff was so engaged at the time of his injury. The court held, in substance, that, if tested by demurrer, the declaration might properly have been subject to the objection, but after verdict the rule by which pleadings are construed against the pleader is reversed, and anything necessary to be proved which may fairly be alleged will be regarded as alleged." In the instant case the declaration showing a cause subject to removal and the proof corresponding thereto, application of the ruling in the prior case above referred to was held erroneous and application for removal should have been granted on motion timely made, and the trial of the cause did not change the situation.

LIABILITY OF DRUGGIST FOR NEGLIGENCE IN SALE OR COMPOUNDING OF DRUGS.

Generally, as to Duty and Liability.—The duty owed by druggists to their patrons is to exercise ordinary care. This, however, is ordinary care with reference to the particular business in question, and is fixed in view of the probable results of negligence. The care required of every person is always commensurate with the dangers involved. It is necessary, in order to establish the required degree of prudence, vigilance, and thoughtfulness, to consider the poisonous character of so many of the drugs with which the apothecary deals, and the grave and fatal consequences which may

follow the want of due care. The general customer ordinarily has no definite knowledge concerning the numerous medicines, but must rely implicitly upon the druggist, who holds himself out as having the peculiar learning and skill necessary to a safe and proper discharge of the duty legally required of him.

"Ordinary care with reference to the business of a druggist must therefore be held to signify the highest practicable degree of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards, consistent with the reasonable conduct of the business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine."¹

"All the authorities agree, and the very necessities of the case require, that the highest degree of care known to practical men must be used to prevent injuries from the use of drugs and poisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care must be commensurate with the danger involved. The skill employed must correspond with that superior knowledge of the business which the law requires. The same rule that applies to the common carrier of passengers, and for the same reason—that is, that the life and safety from bodily harm of a passenger is at hazard, and his security due to the care and skill of the carrier alone, and under circumstances where the passenger is powerless to protect himself—applies to the druggist. So, too, the life and health of a customer at the druggist's counter is at hazard, and he is equally dependent for security upon the care and skill of the druggist, and is equally powerless to protect himself."^{2a}

"In applying his knowledge and exercising care and diligence, the druggist is bound to give his patrons the benefit of his best judgment; for even in pharmacy there is a class of cases in which judgment and discretion must or may be exercised. The druggist is not necessarily responsible for the results of an error of judgment which

is reconcilable and consistent with the exercise of ordinary skill and care. He does not absolutely guarantee that no error shall ever be committed in the discharge of his duties. It is conceivable that there might be an error or mistake on the part of a qualified druggist which would not be held actionable negligence."²

He is required to possess a reasonable degree of knowledge and skill with respect to the pharmaceutical duties which he professes to be competent to perform. He is not required to possess the highest degree of knowledge and skill to which the art and science may have attained, nor to have the skill and experience equal to the most eminent in his profession. That reasonable degree of learning and skill which is ordinarily possessed by other druggists in good standing, is the standard of his qualifications.³

It has been declared to be the duty of druggists to know the properties of the medicines they sell, and to employ such persons as are capable of discriminating when dealing out medicines to customers.⁴

If the druggist was negligent he is liable, whether or not he was registered.⁵

It has been held that the negligent sale of poison is an indictable offense at common law as well as under statute.⁶

In a case where the druggist gave a customer acetanilid when he called for phosphate of soda, and the customer was injured thereby, it was held that negligence would be presumed; the rule *res ipsa loquitur* applying.⁷

Liability for Negligence of Clerk.—It is elementary that the master who undertakes to perform a service is liable for the negli-

(2) Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C 1215.

(3) Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C 1215.

(4) Smith v. Hays, 23 Ill. App. 244; Brown v. Marshall, 47 Mich. 576; Fleet v. Hollenkemp, 13 B. Mon. (Ky.) 219.

(5) Coughlin v. Bradbury, 109 Me. 571, 85 Atl. 294.

(6) Thomas v. Winchester, 6 N. Y. 397.

(7) Knoefel v. Atkins, 40 Ind. App. 428.

(1) Tombari v. Connors, 85 Conn. 231, 82 Atl. 640, 39 L. R. A. (N. S.) 274; Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C 1215; Falkner v. Birch, 120 Ill. App. 281; Knoefel v. Atkins, 40 Ind. App. 428.

(1a) Knoefel v. Atkins, 40 Ind. App. 428.

gence of his servant who, when in the scope of his employment, is performing the services undertaken. This is true as well when the servant is a man of great skill and ability and is performing an act which requires peculiar technical knowledge, as when the servant is a man of no special skill and is doing work of the most ordinary kind. The rule is applicable to a druggist and his clerk.⁸

In a case in which the defendant sought to escape liability on the ground that his clerk was a duly licensed pharmacist, the Court said: "The fact that Cutner, the defendant's clerk who compounded the prescription in question, 'was a competent druggist of experience,' does not relieve the defendant from a claim for damages for injuries sustained on account of negligence of his clerk. 'The most skilful and competent may be, and human experience teaches us will be, sometimes negligent. Hence the fact that one is skilful and competent may prove that he will generally be more careful than the unskilful and incompetent; but it has no tendency to prove due care on a particular occasion.'"⁹

The fact that a druggist, in compliance with a statute, employs a competent and registered pharmacist, does not relieve him from liability for such employe's negligence.¹⁰

Where a clerk supplied an undiluted form of trikresol, when a one per cent. solution was prescribed, and the action was founded on these facts, it was immaterial that the clerk went further and applied the same to plaintiff's arm, or whether in so

(8) Tombari v. Connors, 85 Conn. 231, 82 Atl. 640, 39 L. R. A. (N. S.) 274; Horst v. Walter, 53 Misc. (N. Y.) 591; Goodwin v. Rowe, 67 Ore. 1, 135 Pac. 171, Ann. Cas. 1915C 416; Moses v. Mathews, 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A 698; McCubbin v. Hastings, 27 La. Ann. 713; Norton v. Sewall, 106 Mass. 143; Smith v. Hays, 23 Ill. App. 244.

(9) Tombari v. Connors, 85 Conn. 231, 82 Atl. 640, 39 L. R. A. (N. S.) 274.

(10) Burgess v. Sims Drug Co., 114 Ia. 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359.

doing he was acting in the scope of his employment in so applying it.¹¹

Drug for Particular Purpose.—The purchase of a drug for a particular purpose is not the equivalent of purchasing a particular drug. In the former instance the druggist impliedly represents that the drug is suitable for that purpose. So where plaintiff stated to defendant's drug clerk that he wanted to purchase "ten cents worth of corrosive sublimate to apply to the body to kill lice," and the clerk prepared it for that purpose, and the solution proved to be so strong that it caused severe injury, the defendant was held liable therefor. Such case was held analogous to those where a harmful drug is sold for a harmless one.¹²

Failure to Label Poison—Contributory Negligence of Patron.—Plaintiff, a farmer, who at times practiced veterinary surgery, went to defendant's drug store and purchased a bottle of castor oil and some Rochelle salts, which he himself desired to take, and some sulphate of zinc to make a wash to be applied to a colt's foot. The salts and sulphate of zinc were wrapped in separate packages, and the latter was then attached to a bottle containing the oil by a rubber band. When plaintiff reached home, he placed the bottle and the package of sulphate of zinc, the two being still attached, on a shelf in his room, and the other package, containing the Rochelle salts, he placed on a shelf in a cupboard with medicine used by him in his veterinary work. A few days later, plaintiff desired to take a dose of the salts and his wife undertook to prepare the same for him. She used the sulphate of zinc, which was still attached to the bottle of castor oil, and plaintiff was made ill from taking the same. A statute required the druggist to label poisons, and there was evidence that there was no label on the sulphate of zinc, al-

(11) Goodwin v. Rowe, 67 Ore. 1, 135 Pac. 171, Ann. Cas. 1915C 416.

(12) Goldberg v. Hegeman & Co., 127 App. Div. 312, 111 N. Y. Supp. 679.

though there was positive evidence that there was. There was a verdict in favor of the plaintiff, which was upheld on appeal. The court sustained an instruction which told the jury that even if they found that defendant had failed to label the drugs, as required by law, yet that fact would not relieve plaintiff from the exercise of reasonable care and caution in using the same to prevent injury to himself, and if they further believed that plaintiff knew he had purchased sulphate of zinc with the Rochelle salts, and through his own negligence and want of reasonable care and caution, took the sulphate of zinc instead of the salts, and was thereby made sick and injured, he could not recover for such injury. The court also declared that a violation of the statute requiring labels to be placed on drugs sold, would constitute negligence *per se.*¹³

Improperly labeling Poisons.—In the leading case of *Thomas v. Winchester* (6 N. Y. 397), the agent of defendant, who manufactured vegetable extracts for medicinal purposes, put up belladonna, a deadly poison, in a jar and labeled it dandelion, and sold it to a druggist in New York, who in turn sold it to another druggist, who put it up for the plaintiff in pursuance of a physician's prescription calling for dandelion. A small portion of the medicine was administered to the plaintiff, and she suffered injury therefrom. It was held that the defendant was responsible for the injury without any privity of contract, because he committed an act of negligence imminently dangerous to the lives of others.

The intestate, who was suffering from diarrhoea, went, at the advice of a friend, to a drug store to procure ten cents worth of "black draught," a comparatively harmless drug, of which he intended to take, as a dose, a small glassful. The druggist's clerk testified that he came to the store and asked the proprietor, the defendant, for

(13) *Ankenbrandt v. Joachim*, 173 Ill. App. 158.

ten cents worth of "black drops;" that defendant told him that that was a poison, that the dose was 10 to 12 drops, and advised him to take another mixture; that he refused, and the clerk, by the defendant's directions, gave him two drachms of "black drops" in a bottle, with a label having those two words written on it, but nothing to indicate the dose or that it was poison. The intestate took the bottle home, drank almost all its contents, and died from the effects thereof. It was held error to nonsuit the plaintiff, who sought to recover for intestate's death, but that the case should have been submitted to the jury on the question of whether defendant was not guilty of negligence in failing to place on the bottle a label showing that its contents were poisonous.¹⁴

Smith v. Hayes^{14a} was a case of a druggist selling belladonna for dandelion, and in which he was held liable to the customer, who was injured as a result.

Failure to Dilute.—It has been held to be an act of negligence for a druggist to give one who asks for something to wash out a wound, a solution of carbolic acid so strong that it burns the flesh and turns it black, and that the person to whom it is given is not guilty of contributory negligence in using it.¹⁵

The plaintiff ordered of the clerk in charge of defendant's drug department, for immediate use, a dose of aromatic spirits of ammonia. She drank the same "and became immediately poisoned, and her mouth and throat and other internal digestive organs became burned and inflamed," etc. An expert witness called by the plaintiff testified that each particular discomfort which plaintiff testified followed upon her taking the mixture could be produced by the dose of aromatic spirits of ammonia, if the dose was not sufficiently

(14) *Wohlfahrt v. Beckert*, 27 Hun 74, aff'd in 92 N. Y. 490.

(14a) 23 Ill. App. 244.

(15) *Horst v. Walter*, 53 Misc. (N. Y.) 591.

diluted. Held, that these facts justified the jury in finding that the clerk who prepared and administered the dose was negligent.¹⁶

Plaintiff sought to recover from defendants for injuries resulting from the application of undiluted trikresol, and there was evidence that plaintiff and his physician were in defendant's store, which was in sole charge of an unregistered drug clerk; that his physician prescribed verbally a one per cent. solution of trikresol, for an infection on his arm; that the clerk supplied and applied to his arm undiluted trikresol, with the result that he was seriously injured. A judgment in plaintiff's favor was affirmed.¹⁷

Improperly Mixing Ingredients of Powders.—Actions were brought to recover on account of alleged negligence in compounding a physician's prescription, calling for five grains of phenacetin and five grains of sugar of milk, to be put up in the form of five powders, containing one grain each of the phenacetin and sugar of milk. The prescription had been refilled two or three times, and administered to the little girl, 4 years of age, to whom it was given on this occasion with evil consequences. It was not in controversy that the defendant pursued the usual course in filling this kind of a prescription. He weighed out five grains of each of the required ingredients, placed them in a mortar, stirred them with a pestle "from a minute and a half to two minutes, dumped the mixture upon a prepared paper, graded it up as near as possible, divided it into five equal parts, and then placed them in separate papers and folded them for use, properly marking the box in which they were contained. The evidence showed that this was the appropriate and usual method of filling this kind of a prescription. One of the powders was analyzed, after the child had been given

one of them which proved to be an overdose, and it was found to contain, instead of one grain of phenacetin, only six-tenths of a grain; consequently the other four-tenths must have gone into one or more of the other powders.

In upholding verdicts for the plaintiffs, the Court said that, "It was incumbent upon the defendant either to so thoroughly mix the ingredients that each powder would contain substantially the quantity it was intended to have, or to compound each powder separately by weight, which was practicable to do."¹⁸

Grinding Herbs in Mill Formerly Used to Grind Poison.—A druggist was held liable in damages for injuries to a customer due to taking a dose of medicine made of snake root and Peruvian bark, and in which was a quantity of poisonous drug which had become mixed with the root and bark when they were ground in a machine which had not been cleaned after grinding some of the poisonous drug. Commenting on the general rule of liability in such a case, the court in part said: "If a man who sells fruits, wines and provisions, is bound at his peril, that what he sells for the consumption of others shall be good and wholesome, it may be asked, emphatically, is there any sound reason why this conservative principle of law should not apply with equal if not with greater force to vendors of drugs from a drug store, containing, as from usage may be presumed, a great variety of vegetable and mineral substances of poisonous properties, which if taken as medicine will destroy health and life, and the appearance and qualities of which are known to but few, except they be chemists, druggists or physicians."¹⁹

Misreading Illegible Prescription.—Action was brought by the plaintiff against the defendant druggist on account of the negligence of a clerk employed by him in

(16) *Butterfield v. Snellenburg*, 231 Pa. St. 88.

(17) *Goodwin v. Rowe*, 67 Ore. 1, 135 Pac. 171, Ann. Cas. 1915C 416.

(18) *Coughlin v. Bradbury*, 109 Me. 571, 85 Atl. 294.

(19) *Fleet v. Hollenkemp*, 13 B. Mon. (Ky.) 219.

filling a prescription, which, there was evidence, caused her great pain and suffering. The prescription as intended by the doctor who wrote it called for powders to be taken three times a day, each one containing five grains of calumba, with other ingredients. The clerk who compounded the prescription substituted calomel for calumba. The trial court found in favor of plaintiff, and held that the clerk should, by the exercise of due care, have read the prescription as calling for calumba, or at least that there was such doubt as to the correct reading as should have led him to inquire of the doctor.

In sustaining judgment for the plaintiff, the court in part said: "A prescription calling for 120 grains of calomel to be taken in 24 powders, one three times a day, is extraordinary, and, if taken as directed, was liable to be attended by serious results. Cutner (the clerk) was an experienced pharmacist, and, when he delivered the medicine as he had compounded it, could have anticipated that an injury like that which actually occurred would naturally follow. He could have seen from the nationality and appearance of the plaintiff that she knew nothing of the property and uses of calomel. The prescription itself as he read it in connection with the surrounding circumstances excited his suspicion that calomel was not intended. The record does not disclose that he then made a reasonable effort to ascertain whether he might not be mistaken. The defendant contends that the prescription was written in Latin, illegible, and doubtful as to what drug was really intended. Assuming this to be true, it did not lessen the duty of the clerk to be alert to avoid a mistake. If there was any reasonable doubt as to the identical thing ordered, the defendant's clerk should have taken all reasonable precaution to be certain that he did not sell one thing when another had been called for."²⁰

(20) Tombari v. Connors, 85 Conn. 231, §2 Atl. 640, 39 L. R. A. (N. S.) 274.

Injurious Hand Lotion.—In an action to recover for personal injuries, the plaintiff testified that she purchased from a clerk in defendant's store a bottle of his "Hand Lotion"; that she took it home and used some of it on her hands that evening; that she was in the habit of keeping some cold cream or something of that nature to put on her hands and lips; that she had used the lotion before and found it a good remedy; that she used it on her hands also the next two nights; that at first her hands did not show anything out of the way, or that the medicine was injuring them, but in two or three days they commenced to get red and burn; that she used some of the lotion on her lips and they became red and sore, and scaled off; that she went to defendant's store and saw him concerning the lotion she had used on her hands and he remarked to her: "I don't see why the medicine should affect your hands in that way, unless it was not shaken up; it is a medicine that should be shaken well before it is poured out of the bottle." There was further evidence tending to show that the injuries resulted from the use of the lotion, and were not eczema, as claimed by defendant; and that plaintiff was confined to her bed for some time, and suffered greatly from such injuries. Judgment in favor of plaintiff was affirmed.²¹

Corrosive Sublimate for Chlorodyne Tablets.—The plaintiff recovered judgment for injuries resulting from the wrongful filling of a prescription by the defendant, by substituting corrosive sublimate tablets for chlorodyne tablets, as called for by the prescription. The defendant was a skilful and competent druggist, and when the tablets were returned to him by the physician, after plaintiff had taken one, he admitted that there had been a mistake, but claimed that at the time the store had been moved one of the firm who owned the store (not sued in this case) had, by mistake, put these

(21) Kelley v. Ross, 165 Mo. App. 475, 148 S. W. 1000.

tablets, which were large and white, into a bottle having on it the manufacturer's label "chlorodyne tablets;" that said member of the firm said to him that he "put those tablets in there," and that when the stock was moved "the tablets got mixed, or that bottle was mixed in with the others." It was contended for defendant that not only were the two bottles alike that were labeled "chlorodyne tablets," but that the tablets in the two bottles were alike in color, size and shape. To the contrary, the physicians testified that the tablets in the two bottles shown him by defendant were wholly and strikingly different in both color and size; that in one were large white tablets, marked "poison" in big letters on the tablets, and in the other were the real chlorodyne tablets, small and very dark green in color. Defendant denied that the word "poison" was stamped on the white tablets, but admitted that the genuine chlorodyne tablets with which he filled the prescription after discovery of the mistake were taken from the other one of the two bottles on the shelf labeled "chlorodyne tablets." There was evidence that chlorodyne tablets are of different colors, but no evidence of white ones. In sustaining judgment for plaintiff, the court in part said: "It is inconceivable that, if he had given thoughtful attention to the matter, he could have failed to note the striking difference in the appearance of the tablets in the two bottles bearing the same label, and the extraordinary, if not unprecedented, fact that in one of them the supposed chlorodyne tablets were white. Yet, so far as appears, no special examination or effort was made to determine the real character of the white tablets, but, apparently without question or hesitation, they were delivered to the plaintiff as harmless medicine."²²

Antiseptic for Acetanilid Tablets.—The plaintiff was suffering from a severe headache, and sent her 9-year-old son to a

neighboring drug store to purchase some acetanilid tablets. The boy called at the drug store and made known his wants to defendant's clerk, who, in lieu of acetanilid tablets, gave him antikamnia tablets. Upon receipt of the antikamnia tablets, plaintiff returned them by W., a young man about 20 years of age, with instructions to advise the clerk to send her acetanilid tablets, as originally requested. W. went to the drug store and delivered the message to the defendant's clerk, again naming the kind of tablets desired, whereupon the clerk refilled the box, wrote something upon it, and gave it to W., who delivered them to the plaintiff. The latter was in a dark room at the time, and owing to the pain in her head, and because she assumed that the tablets were what she had requested, she swallowed one. The tablets were in fact antiseptic tablets and poisonous, and as a result of taking the tablet, plaintiff was made ill, and suffered greatly. Defendant's clerk testified that W. asked for antiseptic tablets; that he explained to W. that they were poisonous; and that he wrote the word "Poison" on the box containing the tablets. W. denied asking for antiseptic tablets and that the clerk made any statement that the tablets were poisonous. It was undisputed that the last tablets had on them in raised letters the word "Poison." It was also undisputed that they were returned in the original box which contained the antikamnia tablets, and that there was written on the box what some of the witnesses said was "Paid" and what some said was "Pois." The box did not have on it the skull and crossed bones. It was held that a verdict for plaintiff was warranted by the evidence, and judgment in her favor was affirmed.²³

Laudanum for Rhubarb.—One N. was in the employ of P., and was sick with a cold at P's. shop. P. told him to go home, saying that he would get some medicine

(22) Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C 1215.

(23) French v. De Moss, Tex. Civ. App., 1915, 180 S. W. 1105, 13 N. C. C. A. 63.

and come to his house in the evening and doctor him. That evening P. went to the defendant's apothecary shop and asked for two ounces of rhubarb, and a clerk gave him by mistake, two ounces of laudanum instead of rhubarb. P. then proceeded to N.'s house and administered about an ounce of the laudanum to N., from the effects of which he died in five or six hours. It was held that the plaintiff was properly allowed to recover.²⁴

Bichloride of Mercury for Triple Bromide Tablets.—The plaintiff testified that he went to defendant's drug store to get a headache remedy, and called for triple bromide tablets. Defendant's clerk delivered to him certain tablets in a box, which he paid for. He noticed the clerk writing on the box, but did not read it at the time. Subsequently plaintiff took one of the tablets, and shortly thereafter felt sick, and, upon going into another drug store, it was discovered that defendant's clerk had given him bichloride of mercury tablets, instead of triple bromide tablets. The clerk testified that plaintiff asked for bichloride of mercury. It was held that the case was for the jury, and a verdict for plaintiff was sustained.²⁵

Atropine for Codeine—Getting Drug from Other Druggists.—In refilling a prescription the defendant, a druggist, used atropine as one of the ingredients instead of codeine. The plaintiff took some of the medicine, with the result that she was made ill, and she sued defendant to recover damages therefor. There was evidence that at the time defendant recompounded the prescription he had no more codeine in stock; that he sent to another druggist for six grains, and upon obtaining it discovered that the druggist to whom he applied had

sent him two grains more than he ordered, that defendant then said that it was darker and coarser than that he had previously used, that it did not look like that he had been using, but that "he guessed it was all right"; that thereupon he used it in filling the prescription. Held, that the evidence of defendant's negligence was sufficient to go to the jury. The court stated that whether proof of negligence other than of the mere fact of using atropine for codeine, be necessary to make a *prima facie* case, it was not called upon to determine, and it expressed no opinion relative thereto.²⁶

Common Salt for Epsom Salts—Contributory Negligence.—The plaintiff, a dairyman of long experience in dealing with cows and their ailments, applied to defendant druggist for five pounds of Epsom salts and was given five pounds of common salt. He administered two pounds of the common salt to a sick cow, on the theory that it was Epsom salts, and the cow died from the effect of the dose. It was held that the plaintiff was barred of recovery by contributory negligence, the court in part saying: "There is no confusing similarity in appearance of common salt and Epsom salts. Both are household articles in common use, and more or less familiar to all men of ordinary intelligence and experience. Moreover plaintiff was a dairyman of long experience, and quite familiar with the use of both articles in the course of his business. He was skilled in the art of bovine healing by a practice of 30 years upon his own animals and he habitually administered to them Epsom salts for the relief of those digestive disorders to which they were frequently subject."²⁷

C. P. BERRY.

St. Louis, Mo.

(24) Norton v. Sewall, 106 Mass. 143.

(25) Moran v. Drake Drug Co., 134 N. Y. Supp. 995.

(26) Faulker v. Birch, 120 Ill. App. 281.

(27) Gorman-Gammil Drug Co. v. Watkins, 185 Ala. 653, 64 So. 350.

FOREIGN CORPORATION—SERVICE OF PROCESS.

**PEOPLE'S TOBACCO CO., LIMITED, v.
AMERICAN TOBACCO CO.**

Argued Jan. 4-7, 1918. Decided March 4, 1918.

38 Sup. Ct. 233.

A foreign tobacco corporation which sold its business within a state pursuant to a trust dissolution decree held not to be "doing business" therein so as to subject it to service of process, although it owned stock in local subsidiary companies and advertised its goods and sent soliciting agents within the state.

Mr. Justice DAY delivered the opinion of the Court.

On January 4, 1912, the People's Tobacco Company, Limited, began suit against the American Tobacco Company in the District Court of the United States for the Eastern District of Louisiana to recover treble damages under section 7 of the Sherman Act of 1890 (Act July 2, 1890, c. 647, 26 Stat. 210 [Comp. St. 1916, § 8829]). On January 5, 1912, service of process was made upon W. R. Irby as manager of the company. On January 16, 1912, the company filed exceptions to the service on the ground that it was a corporation organized under the laws of the State of New Jersey; that it was not found within the Eastern District of Louisiana or in the State of Louisiana, and was not engaged in business there, nor had it an agent therein; that W. R. Irby, upon whom service had been attempted, was not an officer, agent, or employee of the defendant, the American Tobacco Company, or authorized to accept service of process upon it at that time. On January 25, 1912, service was made upon the Assistant Secretary of State of Louisiana. Exceptions to that service upon practically the same grounds were filed by the defendant company. A further service was undertaken on February 2, 1914, on the Secretary of State of Louisiana and like exceptions were filed by the defendant company to that service.

Testimony was taken and upon hearing the District Court held that:

1. W. R. Irby was not the agent of the company at the time of the attempted service, and, therefore, the service upon him did not bring the company into court;

2. That the American Tobacco Company was not doing business in Louisiana at the time of the attempted service;

3. That the attempted service upon the Secretary of State of Louisiana did not bring the defendant corporation into court.

Section 7 of the Sherman Act provides that suits of the character of the one now under consideration may be brought in the district in which the defendant "resides or is found." When applied to a corporation this requirement is the equivalent of saying that it must be present in the district by its officers and agents carrying on the business of the corporation. In this way only can a corporation be said to be "found" within the district. In that manner it may manifest its submission to local jurisdiction and become amenable to local process.

The testimony shows that up to November 30, 1911, the American Tobacco Company had a factory in New Orleans for the manufacture of tobacco and cigarettes known as the W. R. Irby branch of the American Tobacco Company, of which W. R. Irby was manager. Under the law of the state it had filed in the office of the Secretary of State an appointment of W. R. Irby as agent, upon whom service of process might be made.

On November 16, 1911, the Circuit Court of the United States for the Southern District of New York made a decree dissolving the American Tobacco Company. Among other things that decree provided that the American Tobacco Company should convey its W. R. Irby Branch to a company to be formed and known as the Liggett & Myers Tobacco Company. Conveyances were made to carry out this purpose.

The American Tobacco Company, by an instrument executed by Mr. Hill, its vice president, revoked the authority of W. R. Irby as its resident agent, and filed the revocation of authority in the office of the Secretary of State of Louisiana on December 15, 1911. W. R. Irby testified that thereafter he was the manager of the Liggett & Myers Tobacco Company, and that he had no connection whatsoever with the American Tobacco Company, nor had he drawn any salary from that company since December 1, 1911.

It is true that the record discloses some instances in which collections were made upon bills in the name of the Irby Branch of the American Tobacco Company after the revoca-

tion of Mr. Irby's authority as its agent. Most of them were stamped across the face, Liggett & Myers Tobacco Company.

There remained on hand with the Irby Branch at the time of the dissolution a quantity of cigarette paper which was continued to be delivered to purchasers by the employees of the Irby Branch of the Liggett & Myers Tobacco Company upon orders received from the American Tobacco Company, and for its benefit and upon its account. This practically continued until the stock was exhausted, which the testimony shows was within a month after the dissolution, and before the attempted service of process in this case.

There were lodged in the custom house in New Orleans powers of attorney of the American Tobacco Company giving authority to those named therein to do what was necessary to make out export papers on behalf of the company. These powers of attorney do not appear to have been revoked, and existed after the service of process. The defendant company issued circulars subsequent to the time it was served with process in this suit; it also advertised in New Orleans newspapers.

A consideration of all the testimony leads us to the conclusion that the American Tobacco Company undertook in good faith to carry out the decree of dissolution, and to take that company out of business in the State of Louisiana. It is true, as found by the District Court, that at the time of the service, and thereafter, the American Tobacco Company was selling goods in Louisiana to jobbers, and sending its drummers into that State to solicit orders of the retail trade, to be turned over to the jobbers, the charges being made by the jobbers to retailers. It further appears that these agents were not domiciled in the State, and did not have the right or authority to make sales on account of the defendant company, collect money, or extend credit for it. It also appears that the American Tobacco Company owned stock in other companies which owned stock in companies carrying on the tobacco business in the State of Louisiana. With these facts in mind we come to a consideration of the proper disposition of the case.

We agree with the District Court that Irby at the time of the attempted service upon him was not the authorized agent of the American Tobacco Company. On December 1, 1911, the American Tobacco Company conveyed its Irby Branch to the Liggett & Myers Tobacco Company. On the same day W. R. Irby, who had been the designated agent of the defendant

company, resigned as a director of the American Tobacco Company, and ceased to remain in its employment. On December 5, 1911, the power of attorney was revoked as we have hereinbefore stated, by the company filing an instrument of revocation in the office of the Secretary of the State of Louisiana; it is true that the revocation was by one of the vice presidents of the company and was attested by the seal of the corporation. But we are not impressed with the argument that this revocation was ineffectual because not sanctioned by formal action of the board of directors of the company. The vice president seems to have had authority in the matter. Apparently he acted with the knowledge and acquiescence of the corporation, and was carrying into effect the decree of dissolution.

Upon the broader question, we agree with the District Court that the American Tobacco Company at the time of the attempted service was not doing business within the State of Louisiana. The question as to what constitutes the doing of business in such wise as to make the corporation subject to service of process has been frequently discussed in the opinions of this court, and we shall enter upon no amplification of what has been said. Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. Phila. & Reading R. R. Co. v. McKibbin, 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; St. Louis & Southwestern R. R. Co. v. Alexander, 227 U. S. 218, 226, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77.

The fact that the company owned stock in the local subsidiary companies did not bring it into the state in the sense of transacting its own business there. Peterson v. Chicago, R. I. & P. R. R. Co., 205 U. S. 354, 27 Sup. Ct. 513, 51 L. Ed. 841; Phila. & Reading R. R. Co. v. McKibbin, 243 U. S. 264, 268, 37 Sup. Ct. 280, 61 L. Ed. 710. As to the continued practice of advertising its wares in Louisiana, and sending its soliciting agents into that state, as above detailed, the agent having no authority beyond solicitation, we think the previous decisions of this court have settled the law to be that such practices did not amount to that doing of business which subjects the corporation to the local jurisdiction for the

purpose of service of process upon it. *Green v. C. B. & Q. R. R. Co.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916; *Phila. & Reading R. R. Co. v. McKibbin*, 243 U. S. 264, 268, 37 Sup. Ct. 280, 61 L. Ed. 710.

The plaintiff in error relies upon *International Harvester Co. v. Kentucky*, 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479, but in that case the facts disclosed that there was not only a continuous course of business in the solicitation of orders within the State, but there was also authority upon the part of such agents to receive payment in money, checks and drafts on behalf of the company, and to take notes payable and collectible at banks in Kentucky; these things, taken together, we held amounted to doing business within the State of Kentucky in such manner as to make the Harvester Company amenable to the process of the courts of that State.

As to the attempted service of process upon the Secretary of State of Louisiana under the Louisiana Act of 1904 (Act No. 54 of 1904) as amended 1908 (Act No. 284 of 1908), we understand the Act, as construed by the State Supreme Court, is not applicable to foreign corporations not present within the State and doing business therein at the time of the service, and having as in this case withdrawn from the state and ceased to do business there. *Gounier v. Missouri Valley Iron Co.*, 123 La. 964, 49 South. 657.

We reach the conclusion that the District Court did not err in maintaining the exceptions filed by the defendant company and in quashing the attempted service made upon it.

Judgment affirmed.

Note.—Serving Officer of Corporation Away from Domicile Thereof.—The instant case does not involve the question set out above, as by the decision it was held merely, that the service was not upon any one who was an officer of defendant corporation at all at the time he was served, nor was he authorized by statute to be served, because the foreign corporation was not then doing business in the state at the time of the alleged service. Whether an officer away from the domicile of his corporation, or, if there, subject to service as an officer of a foreign corporation doing business in the state, can be served elsewhere so as to bind the corporation, is another question.

In *McMenany I. & R. E. Co. v. Stillwell Catering Co.*, 175 Mo. App. 668, 158 S. W. 427, Judge Allen, one of the judges, writing dissenting opinion later adopted by Supreme Court (*S. C. v. S. C.*, 267 Mo. 340, 184 S. W. 467), there was considered the question of the service in another state of an officer of a domestic corporation. In the main opinion it was said as to statute provid-

ing for service outside of Missouri where no officer is to be found inside of the state, that the making of such service valid was plainly provided for by statute and this did not conflict with the ruling in *Augusta v. Earle*, 13 Pet. 519.

Norton, J., concurring, said: "I recognize that our laws are without extraterritorial force. * * * My thought on this question is about as follows: It is clear that the defendant corporation was not in California at the time service was made, for it remained in Missouri all of the time. * * * As president of this corporation, Mr. — may not be regarded in his individual capacity, but rather he is wrapped up in the warp and the woof of the corporation here in Missouri. Though he was in California personally and as an individual, in so far as he represented the corporation he was here in Missouri as well. In other words, he should not be permitted, through utilizing his individuality, by sojourning to California, to separate his existence from the corporation, of which he was president in this state."

In answer to this reasoning, it may be said, the statute to accomplish such a result as this ought to be clear to that intent, and, though it be this, it yet is to be doubted whether or not this is not a carrying of the corporation into another state—at least it carries it there so as to require corporate presence for service. It may be that, so far as the corporation is concerned it might be bound, because this would be a condition of its being chartered. It is true, however, that one state has no power to give its own corporations any existence in another. Admission there may be denied for any reason the other state may think proper.

Missouri's Supreme Court, however, disposed of the case by holding, that statute regarding constructive service had not been complied with, personal service in another state amounting to no more than this constructive service.

In *Swann v. Mut. Res. F. L. Assn.*, 100 Fed. 922, it was held, that where a foreign corporation had been barred from a state, it had no personal presence or existence there, and service on a state officer authorized to be made as long as the corporation remained there was of no effect. But that does not present the precise question in mind. Status considered only related to service in the state. See also *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 356, 27 L. ed. 222.

It was held in *Conley v. Alkali Works*, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. ed. 1113, that service on an officer of a corporation temporarily within a state is not good service on the corporation. But suppose, as some statutes allow, an officer may not be a resident of the home state of the corporation.

It has been held that, if an officer be within a state on business of the corporation and is there served with process, and the corporation is subject to suit there as doing business, the service is good—especially if the suit refers to a breach of the same contract to which his business in the state pertained. *New Haven P. & B. Co. v. Downingham Mfg. Co.*, 130 Fed. 605.

But casual appearance of an officer in a state does not authorize service upon him. *Watkins*

L. M. Co. v. Elliott, 62 Kan. 291, 62 Pac. 1004, 84 Am. St. Rep. 385.

But such cases as these refer to foreign corporations doing business or claimed to be doing business in the state where service is made. Our inquiry is as to the validity of service in another state in a suit against a corporation at its home.

Where a corporation was chartered in West Virginia but none of its officers there resided, it was held that a statute providing that non-resident domestic corporations shall appoint state auditor its attorney in fact to accept service for it, service on him is valid. Wylie Permanent Camping Co. v. Lynch, 195 Fed. 386. This was upon the theory that the state had the right to regulate its own corporations. There it was seen, that there was no attempt to serve process at any place outside of the state. The question above suggested is as to distinction between temporary presence in a state and officer residing there.

There can be no reason for contending that a domestic corporation, if its officers cannot be found in the state, publication service may be made, and it might be that a statute could create presumption of service by delivery to an officer either residing or temporarily present, in another state. But to give such service the quality of service of process in and of itself, is not to be admitted. As a substitute for publication service, as to corporation without the state, the same presumptions in its favor, it seems to us may be held good.

C.

you desire to start suit, we suggest that you communicate direct with him, authorizing him to do so.

Yours very truly,

THE A. COMPANY.

B, if retained in such cases, charges for his services the same fees as he charges other clients (whether or not recommended by the agency). He keeps the entire fee for himself and pays no part of it to A, nor is the amount of his charges against A for professional services reduced on account of professional employment through its recommendation.

If suit is authorized, the relations between B and the client become direct and A's relation to the matter ceases. In cases in which B is retained in the manner outlined above, A makes no charge whatever for its services either to B or to the subscriber.

(1) In the opinion of your committee is there any impropriety in B acting for clients recommended to him under such circumstances?

(2) If the facts are as stated above, except that A does make a charge to the subscriber in matters taken over by B; such charge, however, being only for its own services prior to the taking over of the matter by B, and not being contingent in any way upon the success of B's efforts; would such additional facts affect the propriety of B's actions?

ANSWER No. 147.

The Committee assumes that the collection agency was not organized, nor is it conducted, for the purpose of fostering the interests of the lawyer. (See Q. 47, subdivisions Ib, IIIa, IVa, Va, VIIa.) Upon this assumption, the Committee is of the opinion that, when the need of a lawyer's services arises, an agency may, if requested (and the request be unsolicited) recommend for the handling of the professional matter any lawyer in whom it has confidence, providing the lawyer does not share his fee with the agency, nor pay, directly or indirectly, any consideration for the recommendation. But the regular and habitual recommendation of the lawyer, done with his knowledge and approval, and without any specific request for such recommendation on the part of the patron, has the same quality as any other organized system of solicitation of professional employment, with the single exception that it is free from the taint of being done for compensation.

As to Subdivision 2 of the question, the Committee is of the opinion that the fact that

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 147.

Collection Agency; Employment; Relation to Client—Accepting employment on regular and habitual recommendation of collection agency; Disapproved, with qualifications.—A is a mercantile, credit, and collection agency engaged in the business of furnishing credit information to its subscribers and collecting their claims without suit. B is A's attorney.

Where A is unsuccessful in collecting claims without suit, it recommends to its subscribers the services of B as a lawyer. It writes a letter in substantially the following form:

"Dear Sir:

We beg to advise you that you claim of \$— against X Y Z & Company cannot be collected without legal proceedings. Our attorney, B, is prepared to handle matters of this sort. If

the collection agency makes a charge for its own services, as stated in the question does not affect the propriety of the practice.

(See also Questions and Answers 4, 68, 81, 98, 117, 125 and 136.)

BAR ASSOCIATION MEETINGS FOR 1918— WHEN AND WHERE TO BE HELD.

American—Cleveland, Ohio, at Hotels Win-ton and Statler; August 28, 29 and 30.

Arkansas—Little Rock, May 28 and 29.

California—San Jose, June 6, 7 and 8.

Georgia—Tybee Island, May 31, June 1 and 2.

Illinois—Chicago, Hotel La Salle, May 31 and June 1.

Iowa—Des Moines, June 27 and 28.

Mississippi—Jackson, May 1.

New Jersey—Atlantic City, June 14 and 15.

Ohio—Cleveland, Aug. 26 and 27.

Tennessee—Chattanooga, Aug. 7, 8 and 9.

Wisconsin—Racine, June 26, 27 and 28.

BOOKS RECEIVED.

A Manual on Land Registration. With a Full, Complete Annotated Copy of the Land Registration Act of the State of Georgia. By Arthur Gray Powell, LL.D., Atlanta, Ga., Bar; formerly a judge of the Court of Appeals of the State of Georgia; author of *Powell on Actions for Land*. Atlanta. The Harrison Company. 1917. Price, \$6.50. Review will follow.

Lemuel Shaw, Chief Justice of the Supreme Judicial Court of Massachusetts, 1830-1860. By Frederic Hathaway Chase. Boston and New York. Houghton Mifflin Company. 1918. Price, \$2.00. Review will follow.

A treatise on the law of Personal Property. By James Schouler, LL.D. Ex-Professor in the Boston University Law School, and author of treatises on "Wills, Executors and Administrators," "The Domestic Relations," "Bailments, including Carriers." Fifth Edition. Albany, N. Y. Matthew Bender & Company. 1918. Price, \$7.50. Review will follow.

HUMOR OF THE LAW.

"There is not going to be any more marrying in Indiana," said old Judge Daniels, a crusty old bachelor.

"How is that?" asked his nephew, who had just got married.

"I see the legislature has passed a law forbidding weak-minded persons to marry, and they are the only ones who ever think of doing such a thing."

As old Daniels is rich, both the nephew and his young wife laughed heartily at the wit of the old man.

THE QUESTIONNAIRE.

Please promptly answer, and with care,
The queries in your Questionnaire;
Divorced or single, if wedded tell
The date when tolled the fatal bell;
Give age, condition, weight and race,
And name each blemish—feet or face,
If lame or halt, knock kneed or blind,
Please fully state before it's signed.

If you've had wives, please state how many;
If not, just why you haven't any;
If living with your wife's relation
Then state who rules the home plantation;
Does ma-in-law pay out house rent?
If so, please state to what extent;
Please answer, sir, with utmost care,
'Fore sending in your Questionnaire.

If you've a wife with you to bunk,
State when your clothes went in one trunk;
Here give the total of your boodle,
And state what's wrong with your poor noodle;
Have you flat feet or wheels in head?
Are your beef cattle all corn fed?
How have you lived for twelve months past?
If preacher, state where you starved last.

Have you your last year's taxes paid?
Are you supporting man (or maid)?
If so, is she your wife's relation?
(Be careful here with explanation)
Have you been trained for war's dread strife,
Aside from battles with your wife?
Can you talk Kansas, French or Greek,
And how much English do you speak?

When all have answered and with care,
The queries in the Questionnaire,
Then Uncle Sam will be much wiser,
And all will help to lick the Kaiser.

—Rogers (Ark.) Democrat.

WEEKLY DIGEST

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1. Adverse Possession—Acts of Ownership.—Neither actual occupancy, cultivation, or residence is necessary to constitute actual adverse possession of land situated so as not to admit of permanent useful improvements, as being under water; continued claim of party, evidenced by public acts of ownership which he would not exercise over property which he did not claim, may constitute actual possession.—*Burns v. Curran*, Ill., 118 N. E. 750.

2. Assault and Battery—Peace Officer.—Act of peace officer who, with others, was pursuing automobile on unjustifiable suspicion that occupants had committed felony, in shooting at car to puncture a tire, was unlawful, subjecting him to prosecution for assault with deadly weapon.—*Wiley v. State*, Ariz., 170 Pac. 869.

3. Assignment—Laches.—Delay of over seven years before attempting to enforce performance of contract to assign to plaintiff's patents for shares of corporate stock held laches barring relief.—*Gardner Valve Mfg. Co. v. Halyburton*, N. J., 102 Alt. 893.

4. Personal Right—A contract between a telegraph company and a railroad company contemplating telegraph company's construction of telegraph line on railroad right of way held assignable, not being personal.—*Detroit, T. & I. R. Co. v. Western Union Telegraph Co.*, Mich., 166 N. W. 494.

5. Waiver—Where contractor assigns part of payment to become due when certain work is

done, which owner accepts, owner, by advancing money to contractor before such payment becomes due, waives default and becomes immediately liable to assignee.—*O'Connor v. Smallwood*, N. Y., 169 N. Y. S. 73.

6. Attorney and Client—Attorney's Lien.—Attorney has no general lien, for services rendered executor, on estate's assets not in his possession.—*In re Cutting's Estate*, N. Y., 169 N. Y. S. 205.

7. Contingent Fee—Elements entering into value of legal services are ordinarily character and importance of litigation, time and labor necessarily involved, expense incurred in performing services, results obtained, and, where there is such agreement, that recovery was contingent on success.—*Epp v. Hinton*, Kan., 170 Pac. 987.

8. Misconduct—An attorney held not guilty of professional misconduct in inducing client to execute trust deed and agreement for contingent fee, which later developments proved unreasonably large.—*In re Roth*, N. Y., 169 N. Y. S. 151.

9. Suspension—Attorney who defrauded and misled his client into a forfeiture of his rights and who purchased the property involved in hostility to client and who, in subsequent case involving the fraud was directed to make answer and purposely absented himself from state to avoid being called as a witness, would be suspended for two years.—*In re Wourms*, Idaho, 170 Pac. 919.

10. Bankruptcy—Wife as Bankrupt.—Wife's trustee in bankruptcy held not entitled to recover from husband the amount expended by wife for support of herself and children during husband's abandonment of his family when not representing creditors supplying necessities on husband's credit.—*McCabe v. Guido*, Miss., 77 So. 801.

11. Banks and Banking—Corporation Guarantor.—Unless its charter or the statute expressly permits it, a bank has no power to become a guarantor on a note which it does not own, except as it is necessary to dispose of its own paper and securities.—*International Harvester Co. of America v. State Bank of Upham*, N. D., 166 N. W. 507.

12. Bills and Notes—Admissibility of Evidence.—In action on note, exclusion of defendant's evidence that note was executed without consideration by payee and to enable him to indorse it to plaintiff as collateral, and that debt had been fully paid, was error.—*Smith v. Downing Co.*, Ga., 95 S. E. 19.

13. Counterclaim—Where payee transferred note to bank before maturity, but when it was not paid at maturity took it and transferred it to plaintiff, maker could counterclaim against note for claim existing when payee took note from bank in view of Code Civ. Proc. § 502, subd. 2.—*Woods v. Sizer*, N. Y., 169 N. Y. S. 86.

14. Innocent Purchaser—A bank which loaned money to customer on his note, secured by note of defendant payable to the customer, as collateral, and extended collateral note, and surrendered principal note after maturity, but before expiration of extension, and took over collateral note without knowledge of any defense thereto, was, as to defendant, an innocent

purchaser.—Farmers' & Merchants' State Bank v. Beal, Kan., 170 Pac. 1007.

15.—**Want of Consideration.**—Answer alleging that defendant was induced to give note in place of forged note by false representations, and that the new note was given without consideration, held sufficient to raise the issue of want of consideration.—Carter v. Karterud, S. D., 166 N. W. 524.

16. **Carriers of Goods—Ignorance of Law.**—Where railroad carries goods and charges are paid under interstate rate demanding a certain valuation, the shipper cannot, by pleading ignorance of law, schedules, contract, and bill of lading, recover damages upon valuation calling for higher rate.—Dickerson v. Erie R. Co., N. Y., 169 N. Y. S. 5.

17.—**Notify Order.**—Allegations of petition in interstate carrier's action against surety on consignee's bond to recover amount of judgment paid to consignor "order notify" consignee held not demurrable on ground that they showed a rescission of the delivery made under contract between carrier and consignee.—Draper v. Georgia, F. & A. Ry. Co., Ga., 95 S. E. 16.

18. **Cemeteries—Right of Burial.**—Discontinuance of a family burying ground cannot, for mere commercial reasons, be compelled by persons holding mere private interests against persons having and asserting right of burial.—Clarke v. Keating, N. Y., 169 N. Y. S. 24.

19. **Commerce — Workmen's Compensation Act.**—In view of Workmen's Compensation Act, pt. 6, § 4, no award can be made thereunder against railroad company engaged in intrastate and interstate commerce which accepted act, on account of death of employee engaged in interstate commerce; Congress having exclusively occupied that field by federal Employers' Liability Act.—Carey v. Grand Trunk Western Ry. Co., Mich., 166 N. W. 492.

20. **Constitutional Law—Sale of Liquors.**—Act Nov. 17, 1915 (Acts 1915, Ex. Sess., p. 77), §§ 1, 2, prohibiting under penalty the manufacturing and sale of non-intoxicating liquors or drinks, including near beer, intended as substitutes for alcoholic liquors, does not violate the due process of law clauses, Const. art. 1, § 1, par. 3 (Civ. Code 1910, § 6359), and Const. U. S. Amend. 14 (Civ. Code 1910, § 6700).—Kunsberg v. State, Ga., 95 S. E. 12.

21.—**Special Privileges.**—Amendment to ordinances regulating keeping of cows, dairies, etc., within city, to prohibit keeping of cows in congested sections where they would impair public health, etc., and to revoke all former permits, did not violate Const. art. 1, § 3, par. 2 (Civ. Code 1910, § 6389), forbidding making of irrevocable grant of special privileges or immunities.—Davis v. City of Savannah, Ga., 95 S. E. 6.

22. **Contracts—Bribery.**—That plaintiff had bribed an employee, thinking him an official of a corporation, and then entered into the contract sued on with the real official, the bribery, not affecting the latter transaction, did not invalidate the contract, under Penal Law, § 439, making it a misdemeanor to bribe or remunerate the employee or agent of another.—Merchants' Line v. Baltimore & O. R. Co., N. Y., 118 N. E. 788.

23.—**Performance.**—Where plaintiffs contracted to put defendant's automobile in "good running order," putting it in "fair condition" was not performance.—Kehoe v. Newman, N. Y., 169 N. Y. S. 71.

24. **Corporations—Directors.**—In action for money claimed to have been wrongfully paid from time to time by plaintiff's director to defendant to meet losses resulting from speculation, all such payments being entered when made on the corporate books as though the transactions were had directly with plaintiff, plaintiff could not base its right of recovery on ignorance of the other directors of such entries.—Porter v. Hallet & Carey Co., S. D., 166 N. W. 525.

25. **Damages—Breach of Duty.**—One recovering for injury to property through breach of obligation respecting it by another cannot recover for losses directly resulting from his own failure of duty to prevent or minimize loss, but instruction that plaintiff could not recover if he could have done himself what defendant failed to do goes beyond rule.—Ash v. Soo Sing Lung, Cal., 170 Pac. 843.

26. **Dedication—Estoppel.**—That one claiming title to land dedicated for a street paid taxes and erected improvements, or that the county purchased from another adjacent owner a part of the same strip, did not estop the city to assert dedication.—Wheeler v. City of Oakland, Cal., 170 Pac. 864.

27. **Deeds—Fee Simple Estate.**—Deed of land to one "during his natural life and then to the lawful begotten heirs of his body, and also to (his wife) during her widowhood," granted a fee-simple estate.—Daniel v. Harrison, N. C., 95 S. E. 37.

28.—**Undue Influence.**—To avoid deeds as procured by undue influence, something more than suspicion is required to prove fraud; evidence must be clear and cogent, and leave mind well satisfied allegation is true.—Valbert v. Valbert, Ill., 118 N. E. 738.

29. **Descent and Distribution—Murder of Intestate.**—Where husband murdered his wife and killed himself, his estate is not seized of entire estate in property held by husband and wife as tenants by entirety, although crime was not committed to secure wife's property, and husband's estate, rather than himself, would benefit.—Van Astyne v. Tuffy, N. Y., 169 N. Y. S. 173.

30. **Divorce—Cruel and Inhuman Treatment.**—Where only finding was that allegations against defendant were true, and charge was cruel and inhuman treatment in that defendant associated with other women and had been unfaithful to his vows, decree for plaintiff was not for adultery or extreme and repeated cruelty under § 1a of the Divorce Act, which would invalidate another marriage made within year.—Powell v. Powell, Ill., 118 N. E. 786.

31.—**Habitual Drunkenness.**—To entitle the wife to divorce on the ground of habitual drunkenness, the husband must have become an habitual drunkard after the marriage, so that when plaintiff and defendant were divorced, and she remarried him on his promise to drink no more, she was not entitled to a second divorce for drunkenness.—McNabb v. McNabb, Iowa, 166 N. W. 457.

32. Ejectment—County Map.—A county map, the authenticity and accuracy of which are not questioned, is admissible in trial of suit for land to identify the land involved, but notations and entries thereon by strangers to the title are inadmissible.—Copeland v. Jordan, Ga., 95 S. E. 13.

33.—Pleading and Evidence.—Allegation in petition in petitory action that defendant claims property and has cut out timber thereon, coupled with implied admission flowing from petitory character of action, was sufficient to show that defendant was in possession.—Treadway v. Poitevent & Favre Lumber Co., La., 77 So. 850.

34. Exchange of Property—False Representations.—Representations as to value of land and sufficiency of drainage held to be treated as representations of fact when so intended and understood by defendant living in another state, and not familiar with such land.—Murray Bros. & Ward Land Co. v. Kessey, Iowa, 166 N. W. 460.

35. False Imprisonment—False Arrest.—In action for damages for false arrest with attempted justification by proof that plaintiff had knowingly and feloniously received stolen goods, evidence was admissible to prove that on other occasions he had knowingly received stolen goods.—Smith v. Hern, Kan., 170 Pac. 990.

36. Fixtures—Machinery.—Where mining lease does not provide against removal of machinery placed on claim by lessee, it does not become part of realty as between lessor and lessee or his attaching creditor.—Foote v. Carroll, Colo., 170 Pac. 954.

37. Fraud—Confidential Relation.—Relation of stepmother and stepchild is not confidential one; at least confidential relation does not necessarily exist between stepmother and stepchild.—Ellis v. Hogan, Ga., 95 S. E. 4.

38.—Imputable Knowledge.—Defendants in exchange of properties representing that they knew of their own knowledge that this property cost, and was at the time worth, certain amount, law imputes to them knowledge of falsity of their representation and fraudulent purpose.—Hess v. McCardell, Iowa, 166 N. W. 470.

39.—Misrepresentation.—That defendant, to induce plaintiff to loan \$1,000, stated that it would be deposited in bank account of company in which defendant was officer; that it would not be withdrawn without plaintiff's consent or used for salaries or individual purposes; that, being loaned, it was withdrawn and used to pay salaries, etc., and that the note was not paid—was not fraud by misrepresentation, unless when the loan was made defendant intended not to keep his agreement.—Stoltz v. Reynolds, N. Y., 169 N. Y. S. 170.

40. Frauds, Statute of—Original Promise.—An original promise, not within the statute of frauds, is one in which the promisor's direct object is to further or promote some purpose or interest of his own, although the incidental effect may be the payment of the debt of another.—Pace v. Springer, N. M., 170 Pac. 879.

41.—Parol Contract.—Subsequent delivery and acceptance of any part of goods or chattels the subject of a parol contract within the statute of frauds (Rev. Laws 1910, § 941), while the contract remains in force takes it out of the

statute and validates the entire contract.—Adams v. King, Okla., 170 Pac. 912.

42. Fraudulent Conveyances—Sales in Bulk.—Where insolvent debtor sold stock of goods without complying with Revisal 1908, § 964a, applicable to sales in bulk, and creditor elected to treat sale as void for non-compliance with statute, debtor is entitled to claim his personal property exemption in such goods.—Whitmore-Ligon Co. v. Hyatt, N. C., 95 S. E. 38.

43. Gifts—Joint Bank Account.—Where an aunt established a joint bank account with her niece amounting to a gift, in which were deposited rentals from her property, and thereafter checked on the account, the inference that the rentals were used by the aunt for her own support being as reasonable as the opposite inference, the finding to that effect will be upheld.—Kelly v. Woolsey, Cal., 170 Pac. 837.

44.—Offer—Instrument by which plaintiff required trustee to pay him income from his property for his life and on his death to divide it in certain shares among trustor's children was mere offer, and when not accepted by one child never became effective and was revocable.—Sloan v. Sloan, Ill., 118 N. E. 709.

45. Husband and Wife—Landlord's Lien.—In view of Rev. St. 1908, § 3021, a wife's baggage is liable to lien for room rent under § 4013, although the husband rents the room.—McDonnell v. Solomon, Colo., 170 Pac. 951.

46.—Presumption.—Ownership by wife of farm on which dog was kept by husband is insufficient to raise inference of joint keeping of dog by wife with husband, thereby to overcome presumption of exercise of dominant authority by husband.—McIntire v. Leland, Mass., 118 N. E. 665.

47. Indictment and Information—Disjunctive "And."—Where an offense may be committed by doing of one of several things, the indictment may, in a single count, group them by using the conjunctive "and" where "or" occurs in the statute, and charge commission of all of them.—State Board of Medical Examiners of New Jersey v. Giedroyc, N. J., 102 Atl. 906.

48. Injunction—Damages.—Injury to a street railway company from the interruption of its business while a sewer is being laid is one for which the damages that may be recovered according to legal rules do not furnish adequate compensation, and hence is within the jurisdiction of a court of equity.—Public Service Ry. Co. v. Frazer, N. J., 102 Atl. 890.

49.—Expulsion of Pupil.—Where pupils of city public school with parents' consent, violated a rule by attending moving picture shows on school nights, refusal to enjoin school authorities threatening to enforce the rule by expelling pupils unless they or their parents agreed to obey it, held not error.—Mangum v. Keith, Ga., 95 S. E. 1.

50.—Labor Union.—If labor union notifies employer it will enforce illegal rule, which operates to employer's prejudice he has right to enjoin the union, even in absence of strike or of threats on part of union.—Haverhill Strand Theatre v. Gillen, Mass., 118 N. E. 671.

51. Insurance—Accident—Relative to liability on accident policy from drowning of county engineer in attempting to cross in rowboat flooded river to break ice gorge, held risk was not incident to his office or occupation; code Supplemental Supp. 1915, § 1527s3 et seq.—Rommel v. National Travelers' Benefit Ass'n, Iowa, 166 N. W. 455.

52.—Expiration.—In view of Code Civ. Proc. § 1875, and fact that standard time is uniformly recognized in state, held, that bank and insurer, issuing policy against inside or outside robbery,

contracted with reference to standard time in stipulation as to hours between which custodian of property must be accompanied by guard.—*Bank of Fruitvale v. Fidelity & Casualty Co. of New York*, Cal., 170 Pac. 852.

53.—**Intentional Injury.**—In action on accident policy excluding injury "intentionally inflicted upon insured by any other person," averment that deceased was accidentally killed by being stabbed by unknown negro raised no presumption of its truth, but *prima facie* case would require proof that injury was unforeseen by, and did not result from any misconduct of or provocation by, insured.—*Travelers' Ins. Co. of Hartford v. Newsome*, Ga., 95 S. E. 4.

54.—**Notice of Loss.**—Failure of plaintiff bank to give "immediate notice" of loss by reason of cashier's fraud or dishonesty held waived by insurer's denial of liability upon other distinct grounds.—*Delaware State Bank v. Colton*, Kan., 170 Pac. 992.

55.—**Oral Contract.**—Oral contract by defendant's general agent, who had authority to write policies, mortgage clauses, and renewals, to substitute mortgage clause in fire policy, was valid.—*Hartford Fire Ins. Co. v. J. R. Buckwalter Lumber Co.*, Miss., 77 So. 798.

56.—**Vested Interest.**—Interest of designated beneficiary in ordinary life policy, though containing provisions for loan and surrender value, etc., vests on execution and delivery thereof, and unless it authorizes change of beneficiary without his consent insured cannot make such change.—*Condon v. New York Life Ins. Co. of New York*, Iowa, 166 N. W. 452.

57. **Landlord and Tenant—Counterclaim.**—In rental action, where lessee counterclaimed for damages, evidence that city would remove encroachment if lessor would donate much more valuable portion for street improvement purposes, which he refused to do, resulting in condemnation proceedings, held not to show that lessor unreasonably delayed settling controversy with city.—*Schmid v. Thorsen*, Ore., 170 Pac. 930.

58.—**Seed Sown on Land.**—Where plaintiff, suing to recover timothy seed, had leased the land on which it was grown for a cash rental, the lessee had a title to the seed and a right to mortgage it, so that plaintiff could not recover against the mortgagor.—*Hopper v. Howard*, N. D., 166 N. W. 511.

59. **Livery Stable and Garage Keepers—Damages.**—Where plaintiff's automobile was stored with the owner of a garage at an agreed price for care and storage, and his night man took the automobile for his own purpose and damaged it, there was a breach of contract and plaintiff could recover.—*Corbett v. Smeraldo*, N. J., 102 Atl. 889.

60. **Mines and Minerals—Interest in Land.**—The term "mineral," used to describe the interest in land created or reserved, *prima facie* includes petroleum oil and natural gas, unless it appears that the term was employed in a more restricted sense.—*Horse Creek Land & Mining Co. v. Midkiff*, W. Va., 95 S. E. 26.

61. **Mortgagors—Assumption of Debt.**—Grantee of realty is liable, upon contract embraced in his deed whereby he agreed to assume mortgages on property, directly to holders of mortgages he contracted to assume, whether or not his grantee was liable therefor.—*South Carolina Ins. Co. v. Kohn*, S. C., 95 S. E. 65.

62. **Municipal Corporations—Abutting Owner.**—Where street is opened upon natural grade and dedicated, though not accepted otherwise than by acquiescence, and owner of abutting lot builds with reference thereto, and grade is changed, municipality is liable for injury to lot only as if it were unimproved.—*Ray v. City of Huntington*, W. Va., 95 S. E. 23.

63.—**Building Construction.**—It is clearly within police power of city to regulate construction and use of buildings for protection against fire.—*Hartman v. City of Chicago*, Ill., 118 N. E. 731.

64.—**Drainage.**—Construction of gutter and catch-basins for drainage of surface water from street into brook by highway surveyor of town did not make brook a "sewer" or "drain" under Rev. Laws, c. 49, as to them.—*Blaisdell v. In-*

habitants of Town of Stoneham, Mass., 118 N. E. 919.

65.—**Electric Lighting Plant.**—Municipality authorized to maintain, own and operate electric lighting plant has implied power to dispose of excess electric current.—*McDonald v. Ward*, Ala., 77 So. 835.

66.—**Excessive Speed.**—To drive motor car at rate of 12 miles an hour in fog so dense that driver could not see beyond hood or distinguish another car, although street was illuminated by lanterns about 75 feet apart, is negligence as matter of law.—*Albertson v. Ansbacher*, N. Y., 169 N. Y. S. 188.

67.—**Negligence.**—Traveler is not necessarily negligent in passing over public street or sidewalk which he knows to be dangerous, even though on account of darkness he cannot see so as to avoid danger, but he is required to use that degree of care commensurate with known danger.—*Diffenderfer v. City of Jeffersonville*, Ind., 118 N. E. 836.

68.—**Negligence by Inattention.**—Where plaintiff knew of defect in sidewalk and its attending danger and her fall was due to her forgetfulness, that it was dark did not excuse her inattention.—*City of Birmingham v. Edwards*, Ala., 77 So. 841.

69.—**Nuisance.**—Town is not liable for maintenance of nuisance arising from acquiescence of officers in permitting sale of newspapers and distribution of circulars in streets, though it is reasonably certain papers will be thrown into streets and accumulate where they may be driven by wind.—*Delamaine v. Inhabitants of Town of Revere, Mass.*, 118 N. E. 660.

70.—**Ordinary Care.**—A person is not guilty of negligence in attempting to pass over a sidewalk which he knows to be dangerous, even though on account of the darkness he cannot see so as to avoid the obstruction, but in such case he must use care commensurate with the danger.—*Town of Mooresville v. Spoon*, Ind., 118 N. E. 686.

71.—**Public Officer.**—Officer charged with duties of surveyor of highways is "public officer," and not agent, employee or officer of town, which is not responsible for his acts in diverting surface water from street into culvert.—*Blaisdell v. Inhabitants of Town of Stoneham*, Mass., 118 N. E. 919.

72. **Master and Servant—Assumption of Risk.**—Under common law carpenter who was in charge of and was building up and taking down frames into which concrete was being poured was in position to know the conditions and cannot recover for fall.—*Willis v. Oscar Daniels Co.*, Mich., 166 N. W. 496.

73.—**Causal Connection.**—Causal connection held to exist between employment as doorkeeper of refrigerating room and accident causing employee's death; he having drunk muriatic acid from bottles under sink in refrigerator, where he was accustomed to keep bottle of water for drinking use.—*In re Osterbrink*, Mass., 118 N. E. 657.

74.—**Expression of Opinion.**—If action of employees in calling their fellow servant "Crazy Banana" can be regarded as expression of opinion as to his insanity by few who used term, it does not amount to general reputation characterizing servant as insane.—*Dennis v. Clyde, New England & Southern Lines*, Mass., 118 N. E. 903.

75.—**Hazardous Occupation.**—Under Workmen's Compensation Act, § 3, par. (b), cl. 8, enumerating extra hazardous occupations, and Chicago ordinance stating requirements of hospital building, chief engineer of a seven-story hospital is engaged in an extrahazardous occupation.—*Hahnemann Hospital v. Industrial Board of Illinois*, Ill., 118 N. E. 767.

76.—**Independent Contractor.**—Ordinarily, independent contractor, having finished work and it having been accepted by employer, is no longer liable to third person for injuries received as result of defective construction or installation.—*Travis v. Rochester Bridge Co.*, Ind., 118 N. E. 694.

77.—**Intoxication.**—Intoxication which does not incapacitate the employee from following his occupation does not defeat recovery of compensation, although the intoxication may be a

contributing cause of the injury.—Hahnemann Hospital v. Industrial Board of Illinois, Ill., 118 N. E. 767.

78.—**Look and Listen.**—Rule requiring traveler or other person about to cross railroad track to look in both directions and to listen for approaching train is not applied in all its strictness to railroad employees, and employee's failure to look and listen may or may not be negligence.—Chicago & E. R. Co. v. Steele, Ind., 118 N. E. 824.

79.—**Minimum Wage.**—In action to enjoin members of the minimum wage commission from enforcing orders fixing minimum wages not specifically prescribing the period during which employee might be treated as "learners" or "apprentices," the absence of such provisions would not render order void.—Williams v. Evans, Minn., 166 N. W. 504.

80.—**Quantum Meruit.**—In action at law for wages, wherein plaintiff was required to elect whether to proceed on contract price or for reasonable value of services, recovery may be had upon quantum meruit, although evidence as to express hiring was introduced; stipulated price in such case becoming quantum meruit.—Ton Toy v. John Gong, Ore., 170 Pac. 936.

81.—**Scope of Employment.**—Where after hours, cigar packer saw a light in factory, entered, and was requested by his employer to deliver cigars, held that he was then acting within scope of his employment, and compensation for his death resulting from fall downstairs might be awarded under Workmen's Compensation Law.—Grieb v. Hammerle, N. Y., 118 N. E. 805.

82.—**Workmen's Compensation Act.**—Under Workmen's Compensation Act, pt. 3, § 17, employe of independent contractor can secure compensation against subscriber, if he shows he was at work on premises under control of subscriber, or where contractor had agreed to perform particular work, and that injury arose out of employment which was part of subscriber's business, as in case of removal of materials from subscriber's yard to building.—In re Comerford, Mass., 118 N. E. 900.

83. **Negligence—Common Agency.**—Where two parties use a common agency in conduct of their business, they are both liable to a third party injured by negligent or careless construction and maintenance of such agency, even though it is owned by only one of such parties.—Starcher v. South Penn Oil Co., W. Va., 95 S. E. 28.

84.—**Proximate Cause.**—One dealing in articles inherently dangerous in their intended use must not place them in hands of children of tender years, and if they are sold and injury naturally and proximately results therefrom, seller is liable.—Schmidt v. Capital Candy Co., Minn., 166 N. W. 502.

85. **Principal and Surety—Accommodation.**—An accommodation surety is a favorite of the law, and should be dealt with in the utmost good faith, and is entitled to the strict terms of his engagement, of which the obligor and obligee must take notice.—State v. Adams, Ind., 118 N. E. 680.

86. **Public Service Commissions—Rates.**—Rates charged by public service company may be unjust and unreasonable within P. L. 1911, p. 377, § 16, because too low, as well as because too high.—Collingswood Sewerage Co. v. Borough of Collingswood, N. J., 102 Atl. 901.

87. **Railroads—Obstructing View.**—Defendant railroad was negligent in placing bank of dirt from its track to face of cut and placing on top of such bank board fence obstructing view of those approaching crossing.—Louisville & N. R. Co. v. Treanor's Adm'r, Ky., 200 S. W. 634.

88.—**Public Policy.**—Contract whereby defendant railway granted to plaintiff street railway right to maintain single track across tracks and right of way of defendant in consideration that plaintiff at its own expense maintain necessary crossings is against public policy, and in violation of Burns' Ann. St. 1914, §§ 5676, 5677.—Vandalia R. Co. v. Ft. Wayne & Northern Indiana Traction Co., Ind., 118 N. E. 839.

89. **Reference—Prima Facie Evidence.**—Adverse auditor's report of unambiguous import is clothed by statute with force of prima facie

evidence, and where party offers no evidence in opposition, verdict should be directed in accordance with auditor's finding.—Farnham v. Le Motor Car Co., Mass., 118 N. E. 874.

90. **Reformation of Instruments.**—Evidence Where deceased loaned money to her sons her executor sued for amount thereof, and set up release, instruction that release creates mere presumption of payment was impropper tending to belittle marginal entry of record.—Sutherland v. Briggs, Iowa, 166 N. W. 477.

91. **Sales—Breach of Warranty.**—Where warranty that mule trade was "sound and well" was relied upon and mule was accepted the following day, court or jury might find that there was a breach of warranty.—Jack v. Bates, Okla., 170 Pac. 897.

92. **Sheriffs and Constables.**—Exemption Where judgment debtor requests sheriff levy execution on personal property to set aside personal property exemption therein, sheriff unless suit is one in forma pauperis, entitled to collect his fees for that purpose from plain judgment creditor before proceeding further.—Whitmore-Ligon Co. v. Hyatt, N. C., 95 S. 38.

93. **Specific Performance.**—Fraudulent Intent.—In suit for specific performance of contract to reconvey assignable license under patent to a patent, findings that assignments by defendant corporations conveyed all property used in doing business, and were voted in private meeting of two directors, held insufficient to overcome findings of no fraudulent intent.—Feaver v. Feaster Film Feed Co., Mass., 118 N. E. 916.

94. **Taxation—Inheritance Tax.**—State power to impose inheritance tax either upon beneficiary or property within its jurisdiction and tax on property within jurisdiction of state whether belonging to residents or not passed by laws of state to residents, is valid.—Oakville, Ill., 118 N. E. 775.

95.—**Lien.**—Although proceedings to condemn 68 feet of a 71-foot lot were pending May 1st, when lien for taxes on real estate attached, and the rental value of the premises impaired thereby, the lien for taxes attached the entire lot.—People v. Price, Ill., 118 N. E. 759.

96. **Time—Holiday.**—Day provided by corporation's by-law for holding annual meeting falling on Sunday, meeting held on following Monday, pursuant to notice, held the law regular meeting, under Civ. Code Ariz. 1913, 3287, as to time for doing thing "provided to be done" on a holiday.—Saline Valley Salt Co. White, Cal., 170 Pac. 820.

97. **Waters and Water Courses—Wrong Diversion.**—Where a dyke, forming by accumulation of sand under the partition fence, diverted the natural flow of surface water from defendant's land over plaintiff's land, there no wrongful diversion by defendant in opening the dyke at a natural depression.—Taylor v. Frevert, Iowa, 166 N. W. 474.

98. **Wills—Adopted Child.**—Will devising adopted daughter certain lands "to have and hold as her own absolutely," with further provision that should she sell or attempt to sell mortgage same it should revert to testator's heirs, conveys fee simple estate, and provision against alienation is void.—Davis v. Hutchinson, Ill., 118 N. E. 721.

99.—**Insanity.**—Evidence is admissible of sanity of blood relatives of testatrix in an attempt to rebut presumption of insanity of testatrix, when her insanity is in question, is never admitted in aid of proof showing mental weakness of mind or eccentricity; nor does it permit indiscriminate or unexplained evidence of disease afflicting mental faculties of relatives.—Boston Safe Deposit & Trust Co. v. Bacon, Mass., 118 N. E. 906.

100.—**Power of Appointment.**—Will giving testator's property to his wife for life, giving power to control and sell to pay debts and division equally among testator's five children, but authorizing the wife to bestow the interest of any child on grandchildren, provided testator's children should receive their share for life, held to devise to wife life estate with power of appointment.—Makely v. Shore, N. H., 95 S. E. 51.

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CONSTITUTIONALITY OF STATUTE PREDICATING LIEN ON PROPERTY LEASED FOR SALOON PURPOSES ON JUDGMENT AGAINST LESSEE SUED SOLELY.

In Eiger v. Garrity, 38 Sup. Ct. 298, it was held by U. S. Supreme Court that a statute providing for a lien on premises leased for the purpose of, or used by consent of owner for, conducting a saloon, arising out of a judgment recovered against the saloon keeper for injury or damage suffered by any one from the sale of intoxicants, did not amount to a taking of property without due process of law.

The facts in this case show that a wife sued a saloon keeper for damage resulting to her by reason of selling liquor to her husband. There was default by defendant and, in a trial, judgment was rendered in plaintiff's favor for damages. On this judgment she sued the owners of the property to impress the lien on the premises leased to the judgment defendant.

There was demurrer to the petition, which, being overruled and owners standing thereon, there was judgment rendered establishing the lien.

It is to be noticed that the owners had no day in court so as to contest the right of suit or in fixing the amount of the damages.

The Supreme Court said: "The stress of the argument for plaintiff in error is laid upon the want of notice to the landlord and the lack of opportunity to be heard as to the right of recovery and the amount thereof before his property can be subjected to the lien of such judgment. But the effect of this statute is to make the landlord responsible only when he rents his

property for the use and sale of intoxicants, or knowingly permits its use for that purpose. The statute has the effect of making the tenant the agent of the landlord for its purposes, and through this agency, voluntarily assumed, the landlord becomes a participant in the sales of intoxicants and is responsible for the consequences resulting from them."

The court from this proceeds to declare the statute valid under state police power and upholds the judgment establishing the lien provided by statute.

Is the reasoning of the court in regard to agency in the tenant and the participation by the landlord as a principal in the sales an answer to the contention of lack of opportunity in the landlord to be heard in defense of the claim for recovery and as to amount thereof? It seems to us that it is not.

Let it be conceded, that the statute does create the relation of principal and agent, yet it is not specifically provided, that the principal shall be bound in a suit against the agent. If not, does not the general rule obtain, that for the default or tort of the agent the principal must be sued?

It is not in the creation of the relation of principal and agent that the latter may be sued so as to bind the principal. It is only in the way of evidence of such creation and of acts done within the scope of the agency, that the principal may be held at all. He has the right to contest these points. Their establishment binds the principal and releases the agent, unless in a transaction the latter acts for an undisclosed principal.

It may be, that in a suit against a principal or against an agent, his interest may be adverse to his principal. If liability is fixed upon the one sued, it may operate to release the other. Therefore he must be heard before he may be bound.

But the court says also the "landlord becomes a participant in the sales of intoxicants and is responsible for the consequences resulting from them." But how does this conclusion, as matter of law, make him bound by a judgment against another? If he is in effect charged as a joint tortfeasor, judgment against him as such should be sought in a suit against him.

It is to be admitted that there are statutes in which sureties, as in the case of statutory bonds, "submit themselves to the acts of the principal and to the judgment as itself a legal consequence." By this "they are represented in the proceedings by their principal and are bound by his acts. They thus have their day in court," Evans v. Kloepel, Fla., 73 So. 180. But the court in the instant case argues that, purely as principal and agent or because the statute makes the lessor a joint tortfeasor, the judgment against the agent or the other joint tortfeasor becomes conclusive against the lessor. We believe this to be sound in principle and dangerous in analogy.

The decision in the principal case no doubt could more properly be sustained on the theory that knowingly leasing property for dramshop purposes was an act which, under the police power, might be punished by the imposition of a penalty. This penalty could be either an arbitrarily fixed amount or an amount varying in each case according to the damages resulting to those injured by the wrongful act. In such a view of the case it would be unimportant that the amount, thus regarded as a penalty, is determined in an action to which the offending landlord is not a party. He knows, when he leases his property for purposes regarded as injurious to society, that he may have to pay a penalty (not damages), the amount of which, it is true, is undetermined, but which is to be fixed in the manner provided by law.

NOTES OF IMPORTANT DECISIONS.

DESCENT AND DISTRIBUTION—WAIVER BY WIDOW OF PORTION OF ESTATE VESTED IN HER BY STATUTE.—In Fischer v. Dolwig, 166 N. W. 793, decided by Supreme Court of North Dakota, it was held by a majority of three, that the widow was barred by acquiescence or laches in failing to claim a year's support. The facts are somewhat involved.

There it appears that before the marriage of plaintiff to decedent, there was an oral agreement between her and her intended husband for a consideration paid to waive all rights to his estate; that when he died she consented to the appointment of an administrator; that she waived service of all citations of notice that otherwise might be required and consented to rendition of final decree in the administration. This final decree was rendered and she was decreed to have no interest in the estate and of the intent to claim by the next of kin she was fully apprized. There was decree adjudging all of the estate to such next of kin. Some time later, the estate being wound up and the administrator discharged, the widow asked that the decree be set aside and there be set apart to her the exemption provided by statute. The Supreme Court affirmed judgment of the trial court in defendant's favor.

The majority held, that the oral agreement was void under the statute of frauds under North Dakota statute, but her waiver and knowledge of what would be claimed as to the widow having no interest in the estate and her failure to appeal from the decree barred her rights in the estate.

One of the judges, specially concurring, speaks of the duty of the probate judge to set apart to the widow the exemption allowed by the law, and of its being not "thwarted or defeated even by the previous private contract of the immediate beneficiary," but in this case she was fully advised of the contention of those adversely interested in the estate about the effect of the oral antenuptial contract and of her right to appeal and no fraud appeared in any way. Therefore, she was held to have slept upon her rights, all this enuring to the advantage of those claiming under the decree of the probate court.

Dissenters said that the exemption was not under the statute any part of the estate except for the purpose of ascertaining the amount to be set apart to the widow, and that it could only be subject to charges of last

illness and funeral expenses, as to which there was no claim. This setting apart is mandatory and requires no application therefor by a beneficiary. It is also recited that generally it is for the benefit of the family of decedent and for no particular member thereof. It is the policy of North Dakota law that it be set apart.

Quaere: Do the distributees take the estate, when no setting apart of the exemption has been made, subject to an implied trust? Or does a general order of the probate court distributing it, without regard to the absolute right of the widow or family in the exempted part, operate as *res judicata*, in favor of the distributees?

It seems to us, that the inclusion in the estate of property that really is no part thereof does not vest that property in the distributees of the estate and that the mandatory terms of the North Dakota statute did not oblige the widow, in this case, and the members of a decedent's family, in another case were not bound by the decree any more, than had it included property, that never had belonged to the estate of decedent. If the statute segregated the property from the estate, this was the same as if it had never been a part thereof. Furthermore, if the position of distributees had never been changed by the alleged waiver, they taking with notice of the absolute right of the widow, how were they prejudiced thereby? What had they paid in consideration of her surrender of that absolute right? In the view that they are trustees, there was merely question of statute of limitations barring her right to sue, or it may be, of laches, so far as time is concerned, or of third persons being prejudiced.

ATTORNEY AND CLIENT—LIEN IN EXCESS OF SUM FOR WHICH CLIENT SETTLES SUIT.—Levy v. Public Service Ry. Co., 103 Atl. 171, decided by New Jersey Court of Errors and Appeals, shows a suit by an attorney against a company with which his client had settled a claim in disregard of notice of attorney's lien.

It appears that the client settled for \$30.00 and the attorney sued the company to enforce his lien under a contract providing for a 50 per cent compensation and the trial court awarded him judgment for \$100.00, or more than three times the amount for which settlement was made.

The Supreme Court of New Jersey reversed the judgment upon the theory that the written contract confined the recovery to 50 per cent of the amount, and this reversal the Court of Errors and Appeals affirms, but rejects the rea-

soning employed on the attorney's contention that the 50 per cent applied only to "all moneys received by him by way of settlement," and was wholly silent as to a settlement made by the client.

The Court of Errors and Appeals rules, therefore, that this being true, there either is no lien at all as against the company or it depends upon the right of the client to settle. It is said the lien statute "does not take away the rights of parties to settle their litigations." It was thought that any claim for compensation was, so far as lien is concerned, on the "cause of action, suit and claims," and this was limited by what had been satisfied. But it was thought that as between attorney and client this might not be conclusive of the value of services rendered by the attorney to his client. For such there ought to be a suit in which the client was entitled to have his day in court. This was a matter that under the statute in no way affected the company the client had settled with.

As the case was reversed without remand it is to be considered, that the way in which it was provided settlement only could be made, the attorney had no lien at all protected by the statute. When the attorney attempted to provide only for settlement by himself, it ought not to have taken away his client's right to settle.

PARENT AND CHILD — BURDEN OF PROOF ON STRANGER FURNISHING SUPPORT TO CHILD.—In Dyer v. Helson, 103 Atl. 161, decided by Maine Supreme Judicial Court, it is held, that presumptively a child away from the home of his parents may not be supplied support by a stranger without the latter showing there was immediate necessity therefor and such necessity was occasioned by the parent, who is not presumed to have neglected his duty or as being unwilling to perform it.

Further, it was said that, if a child leaves his home to seek his fortune or to avoid discipline, he carries no credit. Such a presumption as exists in favor of a parent necessarily is subject to great latitude in its application. If the child is male or female, or is of very tender years, or is in immediate danger as to its life or health, humanity may intervene so far as immediate relief is concerned, no matter what may have been the previous conduct of it or its parents. Necessarily, relief must be temporary.

In this case a child was given support by a stranger for more than six years and it was claimed that the parent did not treat him

with the kindness ordinarily shown in their circumstances in life, but it was said this was not shown by a preponderance of the evidence. The father was held not liable to plaintiff.

It seems to us, that it was unnecessary for the father to have been put upon his defense at all. For one to take up and support a child for such a long period, because a parent may not be doing his duty to the child, is to vest the former with a kind of guardianship over the domestic affairs of another. He is rather a volunteer in a matter where the state as *parens patriae* has a right to intervene. It is not designed that a jury should be vested with authority to express its opinion in a verdict regarding such a matter as this. The currents of sympathy would thus be allowed to be capitalized in favor of those presuming to act in the name of charity, when real motives might be very different. And then a way would be opened for invading the sanctities of home for one's personal financial advantage.

DOES AN ACT OF GOD EXCUSE A CARRIER, WHERE THERE HAS BEEN UNREASONABLE DELAY IN TRANSPORTING?

The legal term "Act of God," has been defined as such an act as could not happen by the intervention of man,¹ while Lord Mansfield states that by "Act of God" is meant a natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone, such as violence of the winds or seas, lightning, or other natural accident.² Another definition is any accident due directly and exclusively to natural causes without human intervention, which by no amount of foresight, pains, or care, reasonably to have been expected, could have been prevented.³

It has long been the rule that an "Act of God" excuses the failure to discharge a duty, where it was the sole cause or reason

(1) *Niblo v. Binsse*, 44 Barb. (N. Y.) 54, 62.

(2) *Trent, etc., Nav. Co. v. Wood*, 4 Doug. 290, 287, 26 E. C. L. 479, 99 Reprint 884. See also *Forward v. Pittard*, 1 T. R. 27, 28, 99 Reprint 953, 1 E. R. C. 216.

(3) 1 *Corpus juris*, pg. 1174.

for the neglect. This rule is founded upon the maxim, "*Lex Neminem cogit ad impossibilia.*" (The law requires nothing impossible),⁴ but when the evidence of the cases show other causes contributing to the loss along with the Act of God, then the great conflict of authority develops.

In the law of carriers this question is one of great importance and the purpose of this article is to consider the effect on the defense of Act of God, where there has been a loss caused partially by the delay of the carrier in transporting the goods. According to one line of decisions, negligent delay in transporting, or delivering goods will not render the carrier liable for subsequent loss or injury thereto by an Act of God, where the peril was not reasonably to be anticipated, although had the goods been transported with reasonable diligence they would not have been subject to such loss.

This rule has been followed consistently by the federal courts⁵ and in about nineteen of the state courts.⁶ The foregoing doctrine is predicated on the view that, if the

(4) *Southern Pac. Co. v. Schoer*, 114 Fed. 466, 472, 52 C. C. A. 268, 57 L. R. A. 707.

(5) *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65; *St. Louis, etc., R. Co. v. Comm. Union Ins. Co.*, 139 U. S. 223, 11 S. Ct. 554, 35 L. Ed. 154; *Scheffer v. Washington City Midland, etc., R. Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Railroad Co. v. Reeves*, 10 Wall. 176, 19 L. Ed. 909; *Empire State Cattle Co. v. Atchison, etc., R. Co.*, 135 Fed. 135, same case in 210 v. S 1, 28 S. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; *Kennedy v. The R. D. Bibber*, 50 Fed. 841, 2 C. C. A. 50.

(6) *Hutchinson v. U. S. Express Co.*, 63 W. Va. 128, 14 L. R. A. (N. S.) 393; *Herring v. Chesapeake, etc., R. Co.*, 101 Va. 778, 45 S. E. 322; *International, etc., R. Co. v. Bergman* (Tex. Civ. App.), 64 S. W. 999; *Lamont v. Nashville, etc., R. Co.* (Tenn.), 9 Heisk. 58; *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695; *Armstrong v. Ill. Cent. R. Co.*, 26 Okla. 352, 29 L. R. A. (N. S.) 671; *Daniels v. Ballantine*, 23 Ohio St. 532, 13 Am. Rep. 264; *Gen. Fire Ext. Co. v. Carolina, etc., R. Co.*, 137 N. C. 278, 49 S. E. 208; *McClary v. Sioux City, etc., R. Co.*, 3 Neb. 44, 19 Am. Rep. 631 (but see *Wabash R. Co. v. Sharpe*, 76 Neb. 424, 107 N. W. 758); *Ballantine v. North Missouri R. Co.*, 40 Mo. 491, 93 Am. Dec. 315 (but see also *Armentrout v. St. Louis, etc., R. Co.*, 1 Mo. App. 158); *Yazoo, etc., R. Co. v. Millaps*, 76 Miss. 855, 25 So. 672; *Michigan Cent. R. Co. v. Burrows*, 33 Mich. 6; *Denny v. New York Cent. R. Co.*, 18 Gray 481, 74 Am. Dec. 645; *O'Brien v. McGlinchy*, 68 Me. 552; *Dalzell v. The Saxon*,

carrier could not reasonably have foreseen or anticipated that the goods would be overtaken by such a casualty as a natural and probable result of the delay, then the negligent delay was not the proximate cause of the loss and should be disregarded in determining the liability for such loss.

A federal court in discussing the basis of this doctrine says: "*'Causa proxima Non remota spectatur.'* An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it, but for the interposition of some new, independent cause that could not have been anticipated."^{6a}

An eminent text book writer in considering the point cites an early Pennsylvania case and discusses it as follows: "In that case common carrier undertook to transport goods from Philadelphia to Pittsburg by canal. While on their way the goods were destroyed by an extraordinary flood. There was evidence that the goods would not have been at the place of injury but for their having been delayed by the lameness of a horse attached to the boat; and the complaint was that the culpability of the defendants in allowing the boat to be delayed by the lameness of the horse, having exposed the boat to the flood, was the proximate cause of the loss. Now, if human foresight could foresee the exact time when such a flood might be anticipated, the ar-

gument would be unanswerable, but, as this is impossible, and an accident of the sort is as likely to overwhelm a boat that has been moved with due diligence as one that has been unreasonably delayed, it is obvious that the antecedent probabilities are equal, that the delay will save the boat instead of exposing it to destruction. As is said by the court in the case referred to: 'A blacksmith pricks a horse by careless shoeing. Ordinary foresight might anticipate lameness, and some days or weeks of unfitness for use, but it could not anticipate that, by reason of the lameness, the horse would be delayed in passing through a forest until a tree fell and killed him or injured his rider; and such injury would be no proper measure of the blacksmith's liability.'"⁷

Another writer in discussing leading cases upon this subject says: "In the following cases the admitted or established negligence of the defendant was held not to be the effective legal cause or proximate cause of the damage, or injury for which recovery was sought. It is obvious that in these cases the damage could not be said to be the natural result of the negligence declared on. It was simply due to some other factor. And the conclusion reached in these cases must be the same whether liability is supposed to extend to all natural consequences or only to such as may be foreseen."⁸

In a Michigan case⁹ Justice Marston speaking for the court says upon this subject: "It may be true that, had there been no delay whatever on the part of the defendant, the loss would not have happened. The law, however, cannot enter upon an examination of, or inquiry into, all the concurring circumstances which may have as-

(7) Cooley-Torbe, 72, discussing *Morrison v. Davis*, 20 Pa. 171. 57 Am. Dec. 695.

(8) 1 Street, *Foundations of Legal Liability*, 118, discussing *Morrison v. Davis*, 20 Pa. 171, and *Denny v. New York C. R. Co.*, 13 Gray 481, 74 Am. Dec. 645.

(9) *Michigan C. R. Co. v. Burrows*, 33 Mich. 6, 14.

10 La. Ann. 280; *Rodgers v. Missouri P. R. Co.*, 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 12 Ann. Cas. 441; *Seaboard, etc., R. Co. v. Mullin*, 70 Fla. 450, 70 So. 467; *Gleeson v. Virginia Midland R. Co.*, 16 D. C. 356; *Chicago and E. Ry. Co. v. Schaff Bros.* (Ind. App.), 117 N. E. 869; but see *Railroad Co. v. Mitchell*, 175 Ind. 196, and *Evansville, etc., R. Co. v. Scott* (Ind. App.), 114 N. E. 649; and *Parrill v. Cleveland, etc., R. Co.*, 23 Ind. App. 654.

(6a) *Chicago, etc., R. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 847, 20 Am. Dec. 695.

sisted in producing the injury, and without which it would not have occurred. To do so would only be to involve the whole matter in utter uncertainty, for, when once we leave the direct, and go to seeking after remote, causes, we have entered upon an unending sea of uncertainty, and any conclusion which should be reached would depend more upon conjecture than facts."

In a Texas case¹⁰ where cotton was destroyed by an unprecedented storm, the court held that in order to constitute proximate cause of an injury, the injury must be the natural and probable result of the negligent act or omission. It quotes from another Texas case¹¹ as follows: "Since every event is the result of a natural law, we apprehend the meaning is that the injury is such as may probably happen as the natural consequence of the negligence under the ordinary operation of natural laws. * * * * It would seem that there is neither a legal nor a moral obligation to guard against what cannot be foreseen." The court then applied the above principles to the case as was shown by the uncontradicted evidence and held that in a legal sense there was not causal connection between the act of negligence and the destruction of the cotton by the act of God.

In a recent Indiana case¹² the suit was for the loss of a piano in the Dayton flood of 1913, the complaint alleged that the piano was a rush shipment and had been fifteen days on its journey, which was one of 163 miles, when it was caught in the flood, and it was claimed that the shipment had been unreasonably delayed and by reason thereof was overtaken by the flood and destroyed.

The lower court gave an instruction which stated that the act of God was not a complete defense if they found that the

(10) International & G. N. R. Co. v. Bergman (Tex. Civ. App.), 64 S. W. 999.

(11) Texas & P. R. Co. v. Bigham, 90 Tex. 223, 38 S. W. 162.

(12) Chicago & E. Ry. Co. v. Schaff Bros. Co. (Ind. App.), 117 N. E. 869.

piano had been unreasonably delayed in shipping and that the delay contributed to the injury.

In reversing the case on account of the giving of such instruction the court states both rules as found in the books and approves the one holding that the act of God completely exonerates the carrier even though there may have been negligent delay, on the ground that the delay is not the proximate cause of the loss. In so holding the court said: "The law holds men responsible for the effects of their acts and omissions within the sphere of human control only. An act of God is the manifestation of a super-human power which breaks the chain of causation in the realm of human activity. It upsets the best-laid plans of men and, spoils all their calculations. Because its coming is beyond the scope of man's provision and its power beyond his strength to resist, he is relieved from the consequences thereof."¹³

In a Kansas case¹⁴ which is a leading one on the subject, a car of corn was delivered to the railroad company on May 22, 1903 at Frankfort, Kansas, for transportation to Kansas City, Missouri, the loaded car stood on the track at Frankfort until May 28th, when it was hauled to its destination and was overtaken there by an unprecedented flood on May 30th, 1903, the delay was protracted through the negligent omission of the company to move the car. There was no question but that the flood was an act of God. There was a finding in favor of

(13) This decision is not of the Indiana Supreme Court, and is now pending on a petition to transfer, and may be overruled by that court. In the case of Pittsburgh, etc., v. Mitchel, 175 Ind. 196, the Court cites with approval New York cases holding that before the Act of God can be a defense there must be a showing by the carrier that there was no human intervening agency such as delay. See also R. R. Co. v. Scott (Ind. App.), 114 N. E. 649, and Parrill v. Cleveland, etc., R. Co., 23 Ind. App. 654, neither of which are distinguished in the Schaff Bros. case and both of which cite the New York cases.

(14) Rodgers v. Missouri P. R. Co., 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416, 12 Ann. Cas. 441.

the railroad company in the District Court which was affirmed by the Supreme Court. The following abstracts from the opinion are of interest on the question under discussion. Justice Burch, speaking for the court said: "The maxim is, *In jure, non remota causa sed proxima spectatur*. If a carrier be guilty of negligence not in itself harmful, but wrongful only because of injurious consequences which may follow, and a new cause intervene between such negligence and the injury complained of, which new cause is not a consequence of the original negligence, which reasonable prudence on the part of the original wrong-doer would not have anticipated, and but for which the injury would not have happened, the new cause is the proximate cause and the original negligence is disregarded as not affecting the final result. Carriers do not assume the risk of loss caused by the act of God. * * * In the present case there is no causal relation between the negligence charged and the catastrophe which overtook the plaintiff's property. The carrier's delay did not produce the flood, and for all the carrier could foresee, promptitude might have been as dangerous as delay. The delay was a mere incident to the destruction of the car of grain. The *causa causans* was the flood, the inevitableness of which could not be determined by anything which the carrier might do."

In a recent Maine case^{14a} the Supreme Court holds that the rule held by the great majority of state courts, that a carrier will be held liable where intervening negligent delay causes goods to be in a place where they are destroyed by an act of God, will not be followed where the shipment comes under the Carmack Amendment, on account of the uniform holding of the Federal Courts to the contrary. It there appeared that by the fault of a connecting carrier, the goods were lost in the Dayton flood of 1913. The fault consisted in the carrier

failing to unload the goods promptly on their arrival. Had they been promptly unloaded they would not have been injured. The proximate cause of the loss was held in accordance with federal view to have been the flood and the carrier was exonerated. The court said: "It should not be overlooked that the prime object of the Carmack Amendment was to bring about a uniform rule of responsibility as to interstate commerce and interstate bills of lading and that the principal subject of responsibility embraced by the Act of Congress carried with it necessarily the incidents."

The above quotations are sufficient to illustrate the reasoning followed by the courts relieving the carrier from liability even though there may have been negligent delay in transporting.

The contrary rule which is supported by the very respectable authority, holds that where the carrier has been guilty of negligent delay in transporting or delivering goods entrusted to its care, and thereafter the goods are lost or injured by an Act of God, and but for such delay the goods would not have been exposed to the casualty, the carrier would be liable, and this rule has been held to apply whether the goods are perishable or not.

This rule has been consistently supported by the courts of the state of New York and has been known as the "New York" rule.¹⁵ Besides the courts of New York, this rule has been followed by the courts of about eleven other states.¹⁶

(15) 4 Elliott, Railroads, § 1457a.

(16) McGraw v. Baltimore, etc., R. Co., 18 W. Va. 361, 41 Am. Rep. 696; Read v. Spaulding, 30 N. Y. 630, 86 Am. Dec. 426; Wabash R. Co. v. Sharpe, 76 Neb. 424, 107 N. E. 758; Armentrout v. St. Louis, etc., R. Co., 1 Mo. App. 158; Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 102 N. W. 709, 110 Am. St. Rep. 361, 3 Ann. Cas. 450 and note; Hernsheim v. Newport News, etc., Co., 35 S. W. 1115, 18 Ky. Law. 227; Green-Wheeler Shoe Co. v. Chicago, etc., R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45; Wald v. Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. 888, 53 Am. St. Rep. 332; Lamb v. Mitchell, 15 Ga. App. 759, 137, 84 S. E.

(14a) Continental Paper Bag Co. v. Maine C. R. (Maine), 99 Atl. 259.

The reason usually assigned in support of the "New York" rule is that, where goods are injured by an act of God while in the possession of a carrier which have been unreasonably delayed, that such default is an active operative cause concurrent with the act of God.

It has also been held that a carrier should foresee, as any reasonable person could foresee, that negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty and would therefore increase the peril that the goods should be lost to the shipper. It is also urged that the meaning of "Act of God" excludes all human agency and that there can be no loss by act of God without the total exclusion of all human agency, and that if there be any admixture of human means an injury cannot be an act of God. Another reason advanced is that the law will not permit anyone to take advantage of his own wrong, and this would be the result if the carrier were exonerated from loss caused by an act of God where there had been negligence on its part.

A few cases contend that negligent delay causing loss through an act of God amounts to a technical deviation and hold the carrier liable under the rules governing that subject.

In a leading New York case,¹⁷ the court said: "The law is well settled that common carriers, while engaged in the transportation of goods for hire, are not responsible for injuries to them caused by an act of God, or the public enemy, with the exception of injuries thus caused, they

213; Chicago, etc., R. Co. v. Miles, 92 Ark. 573, 123 S. W. 775, 124 S. W. 1043; Alabama Great So. R. Co. v. Quarles, 145 Ala. 436, 40 S. Rep. 120, 5 L. R. A. (N. S.) 867; Pittsburgh, etc., R. Co. v. Mitchell, 175 Ind. 196; Evansville, etc., R. Co. v. Scott (Ind. App.), 114 N. E. 658; Parrill v. Cleveland, etc., R. Co., 23 App. 654; Michaels v. New York Central R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

(17) Michaels v. New York Central R. Co., 30 N. Y. 564, 86 Am. Dec. 415.

are liable for all damage to goods intrusted to them, while under their care and control. For the reasons stated in the opinion in the case of Read v. Spaulding (30 N. Y. 630) decided at this term, the carrier, to exempt himself, must show that he was free from fault at the time the injury or damage happened. He must show that he was without fault himself, and that no act or neglect of his concurred in or contributed to the injury. If he has departed from the line of duty, and has violated his contract, and while thus in fault, and in consequence of that fault, the goods are injured by an act of God, which would not otherwise have produced the injury, then the carrier, is not protected."

In a Minnesota case¹⁸ we find the following language used: "If, but for negligence, the loss would not have occurred, no sound reason will excuse him, and he should not be relieved by an application of the abstract principles of the law of proximate cause. No wrong doer should be allowed to apportion or qualify his own wrong; and, if a loss occurs while his wrongful act is in operation and force, and which is attributable thereto he should be liable."

The Supreme Court of Illinois,¹⁹ in a case where it was claimed that fog was an act of God, thus expresses itself: "It is unnecessary to determine whether the existence of the fog could in any event be considered an act of God within the meaning of the law; for, however that question might be determined, it appears from the evidence that the accident would not have happened but for the concurrent negligence of appellant (railroad). Even in a case where the immediate cause of the injury to a passenger is an act of God, the carrier will be liable if its negligence concurred in any degree in causing the injury.

(18) Bibb Broom Corn Co. v. Atchison, etc., R. Co., 94 Minn. 269, 275, 102 N. W. 709, 110 Am. St. Rep. 361, 69 L. R. A. 509, 3 Ann. Cas. 450.

(19) Sandy v. Lake Street Elevated R. Co., 235 Ill. 194, 85 N. E. 300.

If there is any intervening human agency which contributes to cause the damage, it cannot be considered as caused by an act of God."²⁰

In an Indiana case²¹ the question was presented whether frost was such an act of God as would relieve the carrier. In deciding the case against the carrier, Mr. Justice Myers said: "But it is claimed that heat and frosts are acts of God. Without stopping to inquire into that question, it is well settled that if there is an intervening human agency, that contributes to the loss, the burden is on the carrier to show that it was prevented from safe delivery by the act of God, and not from delay or negligence in transportation. The complaint alleges that the loss occurred from unreasonable delay in transportation, and the facts disclose that a reasonable time for the carriage was from five to seven days and that nineteen days were consumed in the transportation, and this delay is wholly unaccounted for. If the loss was due to heat or freezing, and they can be said to be acts of God, it was still incumbent upon appellant to show that it was not due to negligence or delay in transporting, or in the language of the cases, an intervening human agency."²²

In an Alabama case²³ a shipment of cotton was destroyed by a cyclone of great violence after it had been unreasonably delayed in transporting by the carrier. There was a recovery below by the shipper and on appeal the Supreme Court reviews the two

(20) This authority cites 2 Hutchinson on Carriers, § 913, in support of its holdings.

(21) Pittsburgh, etc., v. Mitchell, 175 Ind. 196, 91 N. E. 735, 93 N. E. 996.

(22) There was an attempt to distinguish this case in the opinion in Chicago & E. Ry. Co. v. Schaff Bros. Co. (Ind. App.), 117 N. E. 869, but the fact remains that in numerous other Indiana cases the courts have cited with approval the "Michaels" and "Read" cases of New York. See cases cited under No. 13 above.

(23) Alabama Great So. R. Co. v. Quarles, 145 Ala. 436, 40 So. 120, 117 Am. St. Rep. 54, 5 L. R. A. (N. S.) 867, 8 Ann. Cas. 308.

conflicting doctrines or rules which it designates as the Pennsylvania rule exonerating the carrier, and the New York rule holding the carrier.

In affirming the judgment the court gives the following quotation from *Coggs v. Bernard*, Smith Lead. Cas. 319 as stating the true rule: "The true view is not that the carrier discharges his liability by showing an act of God, and is then responsible; as an ordinary agent, for negligence; but that the intervention of negligence breaks the carrier's line of defense, by showing that the injury or loss was not directly caused by the act of God, or, more correctly speaking, was not the act of God."

In a leading Iowa case²⁴ there was an agreed statement of facts stipulating that the carrier was guilty of negligent delay in the forwarding of the goods of plaintiff, and that said goods were destroyed by a flood which was so unusual and extraordinary as to constitute an act of God and it was further stipulated that, if there had been no such negligent delay, the goods would not have been caught in the flood referred to or damaged thereby.

There was judgment for the defendant below and in reversing the case the higher court said: "Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, yet it is now apparent that such delay did subject the goods to the danger, and that but for the delay they would not have been destroyed, and defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and

(24) Green-Wheeler Shoe Co. v. Chicago, etc. R. Co., 130 Iowa 123, 106 N. W. 498, 5 L. R. A. (N. S.) 882, 8 Ann. Cas. 45.

would therefore increase the peril that the goods should be thus lost to the shipper.

This consideration that the peril of accidental destruction is enhanced by the negligent extension of time during which the goods must remain in the carrier's control and out of the control of the owner, and during which some casualty may overtake them, has not, we think, been given sufficient consideration in the cases in which the carrier, has been held not responsible for the loss for which he is not primarily liable, but which has overtaken the goods as a consequence of the preceding delay in their transportation."

The court also advances the argument that in cases such as the one under consideration that there is analogy between such cases and those where there has been a deviation by the carrier, in which cases there has been a uniform holding of liability for loss of freight sustained while on the new route.

The irreconcilable conflict in the authorities is recognized by text writers,²⁵ and we find among them those following the Pennsylvania rule and urging that it is supported by the weight of authority²⁶ while others prefer the New York rule and insist that it is supported by the soundest reasoning.

There is no way of reconciling the authorities on this subject as is shown by the review which we have set out, and the writer can only say to his brethren and the courts: Here are the cases and the rules upon which they are based, take your choice.

SUMNER KENNER.

Huntington, Indiana.

(25) 4 R. C. L. 720; 10 Corpus Juris 126; 6 cyc. 383; 1 Thomp. Neg., § 74.

(26) Schouler, *Bailments*, 1905 ed., § 348; Hale, *Bailments & Carriers*, 361; 6 Cyc. 382; Notes in 86 Am. St. Rep. 888.

LARCENY—RECENT POSSESSION.

STATE v. FORD et al.

Supreme Court of North Carolina. March 13, 1918.

95 S. E. 154.

The presumption of guilt of one in recent possession of stolen goods, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent, and as the other evidence tends to show it to be exclusive, but possession is not limited to custody about the person, but the property may be deposited in some place under lock and key where it is manifest it must have been put by the act of the party or his undoubted concurrence, but it is also imperative that the doctrine be kept within proper limits on account of the temptation to shift evidence of guilt from one to another.

ALLEN, J. The doctrine of recent possession, as applied in the trial of indictments for larceny, frequently leads to the detection of a thief, when without it the guilty would go free, but the temptation to shift evidences of guilt from one to another, and the ease with which stolen property may be left on the premises of an innocent person, make it imperative that the doctrine be kept within proper limits, and as Lord Hale says in his *Pleas of the Crown*, vol. 2, p. 289, "it must be very warily pressed." Gaston J., says in *State v. Smith*, 24 N. C. 406, while discussing a charge to the jury that recent possession of stolen property raised a presumption of guilt:

"From necessity, the law must admit, in criminal as well as civil cases, presumptive evidence; but in criminal cases, it never allows to such evidence any technical or artificial operation, beyond its natural tendency to produce belief under the circumstances of the case. Presumptions of this kind are derived altogether by means of experience from the course of nature and the habits of society, and when they are termed legal presumptions, it is because they have been so frequently drawn under the sanction of legal tribunals that they may be viewed as authorized presumptions. Among these is that which was in the mind of His Honor, the recent possession of stolen goods, in the case of larceny, raising the presumption of an actual taking by the possessor. But when we examine the cases, in which such a presumption has been sanctioned, or consider the grounds of reason and experience on which the presumption is clearly warranted, we shall find that it applies only when this possession is of a kind which manifests that the stolen goods have come to the possessor by his own act, or, at all events, with his undoubted concurrence."

In the Smith case tobacco was stolen Friday night, and was found Saturday morning in a barn on the land of Smith and within 100 or 200 yards of his dwelling, and it was held error to charge that these facts raised a strong presumption of guilt, and the court lays no stress on the use of the word "strong" in the instruction, and deals only with the question whether the facts raised a presumption against the defendant. In State v. Graves, 72 N. C. 485, Pearson, C. J., says that the presumption does not arise except when "the fact of guilt must be self-evident from the bare fact of stolen goods," and Hoke, J., in State v. Anderson, 162 N. C. 576, 77 S. E. 238, that it is only when "he could not have reasonably gotten possession unless he had stolen them himself."

The principle is usually applied to possession which involves custody about the person, but it is not necessarily so limited. "It may be of things elsewhere deposited, but under the control of a party. It may be in a store-room or barn, when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence." State v. Johnson, 60 N. C. 237, 86 Am. Dec. 434. The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent, and as the other evidence tends to show it to be exclusive. State v. Rights, 82 N. C. 675; State v. Record, 151 N. C. 697, 65 S. E. 1010, 25 L. R. A. (N. S.) 561.

Applying these principles, we are of opinion there is evidence to be submitted to the jury as against the defendant Ford, but that there is error in the charge.

His Honor charged the jury that the law presumed that the defendant had stolen the property, or was criminally connected with the theft, if he had control and management of the business, and was in the control and dominion of the warehouse, making his guilt depend on two facts that were not in controversy, and he failed to instruct the jury that this presumption could not, however, arise unless this control, management, or dominion was exclusive, or unless the jury was satisfied beyond a reasonable doubt that the goods were placed in the warehouse "by the act of the party or his undoubted concurrence." State v. Johnson, *supra*. The distinction is important and material. There are thousands of barns, stables, outhouses, warehouses and chicken houses in this state under the control, management and dominion of the owner, many of them open and easy of access, in which stolen

property may be secreted without the knowledge or concurrence of the owner, and it is going far enough to permit possession under these conditions to be considered as a circumstance, without giving it the additional weight of a presumption raised by law, which is equivalent to saying to the jury that the experience and observation of those who have been administering the law for hundreds of years is that the owner of the premises is the thief.

In this case the defendant Ford, who is shown to be a man of good character, testified, without objection and without contradiction, that Davenport, who, with one other not identified, stole the goods from the warehouse at Whitehurst, told him that they intended to carry the goods to Edgecombe county, but when they got to Bethel day was breaking, and they had to put them somewhere, or be caught with them, and as he knew about the warehouse he went around and drew the staple and put them in there. This is not an unreasonable statement, because it must be remembered that the goods were stolen on Saturday night and placed in the warehouse early Sunday morning, and it might be reasonably expected by the thieves that the warehouse would not be used on Sunday, and that the goods would not be discovered before they could remove them on Sunday night.

New trial as to defendant Ford.

Note.—Possession of Property Recently Stolen as Presumption of Law or Fact.—It appears from the instant case that the court below, in effect, instructed the jury that the possession of property recently stolen was a presumption of law, but this presumption was not irrebuttable. This instruction was held error. In prior decision in North Carolina it has been said that "a prisoner found in possession of stolen goods so soon after the theft that he could not reasonably have gotten the possession unless he had stolen them himself, is presumed in law to be the thief." State v. Graves, 72 N. C. 482. And in State v. Record, 151 N. C. 697, 65 S. E. 1010, 25 L. R. A. (N. S.) 561, it was said: "Possession of stolen goods immediately after the theft raises a *violent presumption*" of guilt of the possessor. This seems as objectionable as indicating a rule for instruction to a jury as the older expression. When the instant case says: "The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent and as the other evidence tends to show it to be exclusive," we do not get away entirely from the theory of presumption of law as distinguished from presumption of fact. For the presumption of fact to be qualified as stronger or weaker is, or ought to be, wholly a jury question, admitting, however, that a court may take into account admissibility of evidence of possession as being remote or otherwise. But this gate having been passed the question of weight is for the jury.

In Dodson v. State, 86 Ala. 60, 5 So. 485, there was an instruction that: "The recent possession of stolen property is *prima facie* of guilt of the offense of larceny." Then the instruction distinguished as to burglary for which defendant was on trial by saying the jury must be convinced beyond a reasonable doubt that he broke and entered, etc. The Supreme Court thought that "as matter of law" the guilt of burglary was not thereby shown, but in such a charge this possession was only evidence in the charge of burglary. This distinguishing seems to be inaccurate. The instruction as declaring there was *prima facie* evidence of larceny made proof of burglary depend on a presumption, which was treated as one of law and not one of fact.

In People v. Boxer, 137 Cal. 562, 70 Pac. 671, an instruction telling the jury that: "To justify the inference of guilt from the fact of possession of stolen property," etc., etc., this was held to be misleading as an instruction, because the court could not tell the jury that a presumption of guilt could arise out of any state of facts, as a matter of law.

The Florida Supreme Court expresses itself, it seems to us, more accurately that guilt of an accused does not follow as a presumption of law from unexplained possession of goods recently stolen. Rimes v. State, 36 Fla. 18, So. 114.

In State v. Brady, 121 Iowa 561, 91 N. W. 801, it was said: "The law does not attach a presumption of guilt to any given circumstance, nor does it require the accused to overcome the presumption thereby raised, in order to be entitled to an acquittal."

In Johnson v. Territory, 5 Okla. 695, 50 Pac. 90, it was thought that no presumption of law could arise from any proof of possession of stolen goods, because it was for the jury to determine whether as a fact accused had been proven guilty.

As showing that possession of stolen property is nothing more than a circumstance, admissible as not being remote in Com. v. Coyne, Mass., 117 N. E. 337, it was said in speaking of evidence of the possession of property of considerable value that: "It's weight may be trivial or cogent according to other conditions shown. It might be slight against a person of affluence and of extravagant habits. It might be of importance against one of small estate or of no-visible means of support."

In State v. Littleton, W. Va., 88 S. E. 458, the lower court instructed the jury that: "The possession of property proven to have been recently stolen is evidence from which the jury may infer that the person in whose possession or constructive possession, such property is found is guilty of the theft, provided that such possession is unexplained." This was a burglary case and the instruction was held error, because as the court said: "It is now well settled in this state that possession of stolen goods is not of itself *prima facie* evidence that the person in possession is the thief, but finding such goods recently after the offense is committed, in the exclusive possession and control of the accused, is a circumstance which may be submitted to a jury with other evidence." See also State v. Reece, 27 W. Va. 375.

We think, that everything in the way of fact of possession of stolen property is a mere fact which a jury is to take and draw such inference therefrom as they see fit, whether that possession be of property recently stolen or not and whether

such possession is explained or unexplained or attempted to be explained. There seems to be no reason in singling this kind of fact out and attaching to it, in a criminal case, at least, any presumption at all. It, like other facts, may be admissible, as having, according to judicial cognizance, a tendency to establish the main fact involved, but the directness or otherwise of that tendency is purely a question of fact.

C.

ITEMS OF PROFESSIONAL INTEREST.

Camp Johnston Bar Association.

So many lawyers have volunteered or been drafted into the army that we are not surprised at the organization of a new Bar Association at Camp Joseph E. Johnston, Fla. Lawyers are so accustomed to meeting together that such an association must be highly gratifying to lawyers in the army. This new association, of which G. S. Moore, of Nashville, Tenn., is president, is said to be the first of its kind.

New Attorney General for Minnesota.

Attorney General Lyndon A. Smith, of Minnesota, died March 5th, and as his successor Gov. Burnquist recently appointed Clifford L. Hilton, of St. Paul.

New Convert to the Torrens System.

The propaganda for the Torrens System of land registration has made a new convert. Georgia is the latest state to adopt this system. William E. Arnaud, of Atlanta, has been appointed county examiner by the judges of the Superior Court of Fulton county, Georgia. Mr. Arnaud has made a careful study of the subject and has contributed many articles explaining the working and benefits of the new system.

Law Writer Dies.

A noted legal author, William Lawrence Clark, of Brooklyn, died March 2nd, aged 54 years. Mr. Clark was known principally for his law writings. He was an indefatigable worker, his legal works covering a very wide range of subjects, including Contracts, Corporations and Criminal Law. He contributed many articles to the law cyclopedias and was one of the editors of the Edward Thompson publications.

Bar Association Referendum.

The American Bar Association recently announced the result of the referendum of the

question of increasing the salaries of federal judges, submitted to its members last December. The result was 4005 votes in the affirmative and 692 in the negative.

Dr. Collier Becomes a University President.

Dr. William Miller Collier, author of Cyc and editor of American Bankruptcy Reports, has just been elected President of the George Washington University, Washington, D. C., to succeed Rear Admiral Stockton, U. S. N., retired, who presented his resignation to take effect August 31st next. Dr. Collier, in addition to his work as a legal author, has served for several years as Civil Service Commissioner of the State of New York. In 1905 he was minister plenipotentiary to Spain.

CORRESPONDENCE

GUARD-RAILS ON BRIDGES—NECESSITY AND CONVENIENCE.

Editor Central Law Journal:

We have read with considerable interest, Mr. Cooper's paper on Guard-Rails on Bridges, 85 Cent. L. J. 279, but think his conclusions in the matter mistaken, as are also the conclusions of the courts cited by him.

We take issue with these conclusions on the ground that what were ordinary contingencies thirty years ago, before the use of the automobile became common, are not ordinary contingencies to-day, and that any protection against accidents, in the construction of bridges at the present time, should cover such possibilities of accident as occurred in the cases named in Mr. Cooper's article. Of course, if the purpose of a guard-rail—which in such a case would be a misnomer—is intended simply to give notice of danger, and not for protection, then, it would seem to us, a recovery for damages would be impossible in any case.

J. H. ROCKWELL.

Springfield, Illinois.

NOTE—We publish this without particular comment on the interesting question treated in the article referred to. Of course, a guard-rail—its necessity and convenience—should be deemed sufficient or not according to prevailing customs and modes of travel across bridges. If a guard-rail might be deemed sufficient as to horse-drawn vehicles, it might not as to automobiles, or vice versa. These are questions for practical consideration by highway authorities.—Editor.

HUMOR OF THE LAW.

Executor: See here. If I list my late father's estate as bigger than it is they'll jump me for an income tax and if I make it smaller than it is the bank will call my loans.

Lawyer: Why not make it exactly true?

Executor: By jove! I never thought of that.

"Dot boy of mine is going to make a goot business man," said Mr. Beckstein. "Yesterday I told him I was going to leave all my broberty to him ven I died, und vat you s'pose he say to dot?"

"I don't know, Mr. Beckstein."

"Vell, he say he vill throw off five per cent for sbot cash."

"What's this?" asked the acquitted man.

"The bill for my service," said the lawyer.

"Go on! You proved that I was insane, didn't you?"

"Yes."

"Well, you can't do business with an insane man. You ought to know that."—St. Louis Star.

Gas attacks are not to be feared by soldiers at the front only. In Chicago, in the course of the second Liberty Loan drive, for instance:

A. Happer, a Liberty Bond salesman, went into a dentist's office, where a big man lay inert in the operating chair. The dentist was working over the patient feverishly.

"What's the—" began Happer.

"Can't get him out—can't get him out of it," gasped the dentist. "Gas, you know—gas. He won't come out of it. Here, lend a hand and help bring him to. Take his arms—this way. Come on!"

"Right-o!" cried Happer. "But if I bring him out, will you buy a Liberty Bond?"

The dentist would have promised to do much more than that. In a minute the patient began to show signs of life. He gasped, shivered, and, at last, sat up.

"Where am I?" asked the patient.

"Excuse us," said Happer. "We just waked you up to sell you a Liberty Bond."

Twenty minutes later Happer left the office with two signed applications and two checks in his pocket.

"Everybody who isn't unconscious is buying a Liberty Bond," said Happer, when he related the story.—National Corporation Reporter.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. Adverse Possession — Adverse Claim. — Where defendant based his claim to land in adjoining section upon his purchase from adverse holder, held that, though parcel on which his improvements were placed extended into adjoining section, his previous claim to land in that section did not prevent submission of claim to 160 acres in other section on ground of incompatibility of claims.—Gallup v. Creal, U. S. C. C. A., 247 Fed. 312.

2. Evidence. — In ejectment, defended on the ground that defendants had acquired title by adverse possession of the deceased husband of one defendant, evidence that his widow sought to borrow money to pay the taxes, accompanied by the declaration that she owned the premises, was properly excluded, since she stood on the title perfected by her husband.—Pope v. Hogan, Vt., 102 Atl. 937.

3. Statute of Limitations. — Landlord, on renewal of annual lease, comes constructively into possession, and hence, though property was in possession of tenant during period of plaintiff's adverse user of the water tunnel he had built on the land to carry water to his adjoining land, yet where lease was annually renewed limitations run against landlord.—Gartlan v. C. A. Hooper & Co., Cal., 170 Pac. 1115.

4. Assault and Battery—Evidence. — Seizing of saddle bags lying on ground and examination of same in presence of owner and over his protest is not an "assault."—Manning v. Roberts, Ky., 200 S. W. 937.

5. Deadly Weapon. — Drawing of pistol accompanied by threat, evidencing intention to use it, held an assault, though offender was prevented from presenting the pistol in the attitude of firing it.—Johnson v. State, Ark., 200 S. W. 982.

6. Attorney and Client—Compensation. — Rule that attorney may only recover reasonable sum for services notwithstanding attempted fixing of value by contract after relation commenced, held applicable only when there are special reasons for its application.—Countryman v. California Trona Co., Cal., 170 Pac. 1069.

7. Compensation. — Where Special Term on motion, made order fixing attorney's compensation for services in action for death, remedy of guardian of intestate's children was not by independent motion to vacate order, but by direct appeal.—In re Atterbury, N. Y., 118 N. E. 858.

8. Estoppel. — Statement of attorney for administratrix that he thought she would pay claim when she got the money held not to bind her or estop her from pleading limitations against the claim.—Butler v. Fechner, Tex., 200 S. W. 1126.

9. Suspension. — Under Code Civ. Proc., § 287, subd. 2, district attorney who hampered administration of criminal law by endeavoring to secure provision for prosecutrix and child rather than to convict one charged with rape, and also used abusive language regarding judge of superior court, held to be suspended from practice for year for such violations of his duty, under § 282, subds. 1, 2.—In re McCowan, Cal., 170 Pac. 1100.

10. Automobile—Pedestrian's Negligence. — If plaintiff jumped from moving street car in front of passing automobile, he cannot recover for injuries so received.—Horowitz v. Gottwalt, N. J., 102 Atl. 930.

11. Bankruptcy — Anticipatory Breach. — While adjudication in bankruptcy creates anticipatory breach of bankrupt's contracts, it does not make agreement to pay out of uncertain fund, which may never come into being, fixed liability which can be proven under Bankr. Act, § 63.—In re 35% Automobile Supply Co., U. S. D. C., 247 Fed. 377.

12. Discharge. — Where school teacher prepared for assetless bankruptcy to avoid payment for expensive fur coat, held, that her omission from schedules of salary due at time they were verified will preclude discharge.—In re Garrity, U. S. C. C. A., 247 Fed. 810.

13. Involuntary Petition. — Though involuntary petition in bankruptcy against corporation did not allege act of bankruptcy, yet, where it was in fact insolvent, it may by resolution confess its insolvency and inability to pay its debts and declare its willingness to be adjudicated bankrupt on that ground, and, if that be done, new petition can be filed.—In re D. F. Herlehy Co., U. S. C. C. A., 247 Fed. 369.

14. Jurisdiction. — In a proceeding against a partnership, although no adjudication is made against the partners, they and their estates are brought within the jurisdiction of the court, which may on their application discharge them from further liability for the partnership debts.

—Armstrong v. Norris, U. S. C. C. A., 247 Fed. 253.

15.—**Judgment Lien.**—Under Bankr. Act, § 3a, subd. 3, where judgment creditor delays more than four months in advertising or directing sale under execution, no act of bankruptcy is committed, though judgment lien then becomes invulnerable to attack under act.—In re D. F. Herlehy Co., U. S. C. C. A., 247 Fed. 369.

16. **Banks and Banking—Charging Back.**—Deposit of draft or check in ordinary course of business, depositor, receiving credit against which he can draw, held a sale, transferring title, and the bank cannot charge back the amount in case of dishonor.—First Nat. Bank v. Stengel, N. Y., 169 N. Y. S. 217.

17.—**Holder in Due Course.**—The payee of a note is not a "holder in due course," within the meaning of Negotiable Instrument Law (Rev. St. 1909, § 10022), and the note in his hands is subject to the same defenses as if it were non-negotiable.—Long v. Mason, Mo., 200 S. W. 1062.

18.—**Notice.**—That bank officials knew that one signing a note as a director did not mean to be personally liable is not a defense, in an action by the bank on the note.—Nimnich v. Bank of Corning, Ark., 200 S. W. 992.

19.—**Print and Writing.**—In note containing printed words "pay to the order of" immediately before name of payee, and the written word "only" immediately after his name, the written word prevails over printed words, and note is non-negotiable.—First Nat. Bank of Sidney v. Greenlee, Neb., 166 N. W. 559.

20.—**Waiver.**—Under Act No. 64 of 1904, §§ 109-111, a waiver of protest written on the face of a negotiable note before it is indorsed is deemed to be a waiver by the indorser not only of a formal protest, but also of presentment and notice of dishonor.—Frank-Taylor-Kendrick Co. v. Voislement, La., 77 So. 895.

21. **Brokers—Breach of Duty.**—Action of stockbrokers in taking over for their own account stocks carried on margin for customer held breach of duty owing customer, damages being same whether it was sale or conversion, and sales made by brokers to themselves, though at market value, were voidable by customer at his election.—Hall v. Paine, Mass., 113 N. E. 864.

22. **Carriers of Goods—Carmack Amendment.**—The Carmack Amendment does not affect the common law rule that when a carrier of goods relies upon one of the excepted causes of damages as a defense, in action by the shipper, it must establish that damages proximately resulted therefrom.—Haglin-Stahr Co. v. Montpelier & W. R. R. Co., Vt., 102 Atl. 940.

23.—**Connecting Carrier.**—A connecting carrier is liable on the bill of lading of receiving carrier for damages done to goods while being shipped on its lines.—Emil Grossman Mfg. Co. v. New York Cent. R. Co., N. Y., 169 N. Y. S. 213.

24.—**Seizure by Process.**—A carrier will be protected against a shipper or consignee, if property has been seized or taken from its possession by attachment, replevin, or search warrant at instance of a third person.—Atchison, T. & S. F. Ry. Co. v. International Land & Investment Co., U. S. C. C. A., 247 Fed. 265.

25. **Carriers of Passengers—Alighting.**—Rule of street railway requiring conductors to go forward and look for approaching train before signaling ahead would not excuse conductor from first discharging duty to alighting passenger, and his negligence would render company liable for injury.—Cain v. Kanawha Traction & Electric Co., W. Va., 95 S. E. 88.

26.—**Evidence.**—In action against street railway for injuries at station, testimony that it would have been good engineering to have used movable platform under conditions at particular place of injury was competent.—Harrington v. Boston Elevated Ry. Co., Mass., 118 N. E. 880.

27. **Chattel Mortgages—Attesting Witnesses.**—That signature of one of attesting witnesses to chattel mortgage was forged is immaterial; such witness not being necessary to validity of mortgage between parties.—Chase v. Cable Co., Okla., 170 Pac. 1172.

28.—**EstoppeL**—That transferee of chattel mortgage authorizing mortgagee to collect as its trustee knew cotton received from mortgagors would be placed with factors for storage or sale, held not to estop it from asserting its rights.—Baker, Lyons & Co. v. American Agricultural Chemical Co., Ala., 77 So. 866.

29.—**Renewal.**—A renewal of chattel mortgage, by executing new mortgage and discharging old mortgage of record, merely continues lien, and renewed mortgage is superior to chattel mortgage executed before renewal, but subsequent to original mortgage.—First State Bank of Saltillo v. Ennis Title Co., Tex., 200 S. W. 1122.

30. **Commerce—Employe.**—A fireman on an interstate train assisting other employes in repairing a water spout at a tank where his engine must then take water, was within his duties, and an injury while so engaged comes under the federal Liability Act.—Texas & P. Ry. Co. v. Williams, Tex., 200 S. W. 1149.

31.—**Interstate Business.**—Maine corporation pursuant to contract with city of Boston furnished fire alarm lamps, boulevard lanterns, etc., and gas used, transacted local and domestic and not interstate business.—Parker v. Rising Sun Street Lighting Co., Mass., 118 N. E. 871.

32. **Constitutional Law—Delegation of Authority.**—Selective Service Act, May 18, 1917, § 13, making it offense to maintain houses of ill fame within such zone as may be prescribed by Secretary of War, is not invalid as delegating legislative authority to executive officer.—United States v. Casey, U. S. D. C., 247 Fed. 362.

33.—**Due Process of Law.**—Acts 1907, c. 32 (Thomp. Shan. Code, § 2853a2 et seq.), requiring registration and license fee of \$3 in order to keep a female dog, does not contravene Const. art. 1, § 8, providing that property shall not be taken without a judgment of peers of the land, or without compensation.—State v. Erwin, Tenn., 200 S. W. 973.

34.—**Elections.**—Failure of Laws 1917, c. 815, to provide for voting by soldiers and sailors on liquor tax question, held not to require resubmission, as, under Const. art. 2, § 1, they had a right to vote, irrespective of legislative action.—In re Zierbel, N. Y., 169 N. Y. S. 270.

35.—**Principal and Surety.**—Code Civ. Proc. § 1183, providing that no modification of build-

ing contract between owner and contractor shall relieve any surety on bond, is not unconstitutional, in that it is impossible for the owner, contractor and surety to enter into a contract, the obligation of which is definitely established in advance.—*Hubbard v. Jurian*, Cal., 170 Pac. 1093.

36. **Contracts—Lien for Advances.**—Under a contract for advances between bank and owner of a brick plant and its lessee, held, that brick released and sold were not subject to lien for subsequent monthly advances made to lessee; contract providing for monthly settlements.—*Bank of Ragland v. Hudson*, U. S. C. C. A., 247 Fed. 241.

37. **Pledge.**—Where C, who had purchased and agreed to carry stock for S's account, pledged it, together with other stock owned by C, to pledgee without notice, held equity would compel C's stock and the sum to be paid by S for stock to be first applied to payment of C's note.—*Clayton v. Smith*, N. D., 102 Atl. 925.

38. **Waiver.**—Where there was no agreement by stockholder and creditor of corporation that he would waive his rights as creditor, if others would take over portion of his stock, there was no promise by him for benefit of third person with those taking portion of his stock could assert on behalf of corporation, despite stockholders' agreement with corporation as to payment.—*In re 35% Automobile Supply Co.*, U. S. C. C. A., 247 Fed. 377.

39. **Corporations—Mortgage.**—Mortgages of assigned patent rights by corporation were not void because it may be inferred that the president and hence the corporation knew installment payment to assignor would not be paid.—*Feaster v. Feaster Film Feed Co.*, Mass., 118 N. E. 912.

40. **Organization.**—To effectuate corporate organization, act under which it is organized need provide neither for amendment of articles, nor that on compliance with it organization shall be corporation.—*Superior Lodge, Degree of Honor v. Van Camp*, S. D., 166 N. W. 545.

41. **Presumption.**—In action against Maine corporation by collector of city of Boston to collect taxes on personal property, company doing business in state, it may be presumed that it has complied with provisions of statutes as to appointment of agents for service of process and otherwise.—*Parker v. Rising Sun Street Lighting Co.*, Mass., 118 N. E. 871.

42. **Damages—Evidence.**—In action for personal injury while engaged temporarily in pushing loaded cars from pit mouth to checkhouse, at \$2 per day, plaintiff's testimony that he was skilled miner able to earn greater wages when opportunity offered was admissible.—*Clark v. Butler Junction Coal Co.*, Pa., 102 Atl. 952.

43. **Lessening Damages.**—Where plaintiff's sub-lessee, in breach of a contract, suspended pumping operations immediately on giving notice of intention to cancel lease at expiration of 80 days, held that, though plaintiff's lease was forfeited for failure to operate pumps, plaintiff could not recover value of its lease, for that was consequential damage, which might have been avoided by relatively trifling expenditure.—*Bear Cat Mining Co. v. Grasselli Chemical Co.*, U. S. C. C. A., 247 Fed. 286.

44. **Nominal.**—Although a landowner is entitled to water at a certain rate, he cannot stand by and recover more than nominal damages for loss of crops and trees from lack of water because the defendant refuses to furnish water at such rate.—*Henrici v. South Feather Land & Water Co.*, Cal., 170 Pac. 1135.

45. **Punitive.**—In action for damages to property by railroad's blasting operations in quarry, answering affirmatively special issue whether the operations were done willfully, etc., would have permitted an award of punitive damages, but did not require it, but negative answer precluded such award.—*Cobb v. Atlantic Coast Line Ry. Co.*, N. C., 95 S. E. 92.

46. **Special Damages.**—Although petition did not allege in terms that charges for medical, hospital, and traveling expenses were reasonable, it was sufficient to authorize finding of special damages, where it alleged that it was necessary for plaintiff to incur such expenses.—*Louisville & I. R. Co. v. Frazee*, Ky., 200 S. W. 948.

47. **Deeds—Recording.**—Where grantor who was dissatisfied with unrecorded deed obtained possession thereof, made certain changes, and redated it to correspond with date of its new execution, effect of deed was same as if it had originally been dated as of date of new execution.—*Jeffrey v. Langston*, Ky., 200 S. W. 917.

48. **Divorce—Physical Violence.**—Under divorce statute, Rev. Laws, c. 162, § 1, wife's libel for divorce, alleging cruel and abusive treatment, was properly dismissed, where there was no evidence of physical violence, and libellant's illness was caused solely by alienation of husband's affections.—*Armstrong v. Armstrong*, Mass., 118 N. E. 916.

49. **Electricity—Volunteer.**—Damages are recoverable for death of one who, in voluntary effort to protect others, was killed while attempting to remove charged electric wire dangling in public street as result of telephone company's negligence, if he took reasonable precautions to protect himself.—*Workman v. Lincoln Telephone & Telegraph Co.*, Neb., 166 N. W. 550.

50. **Estoppel—Insolvent Corporation.**—Claimant, stockholder and creditor of corporation, held not estopped, as against those who acquired his stock in corporation, from asserting his claim against it, despite agreement that he should be paid out of earnings, where corporation was so insolvent that stockholders would get nothing in any event.—*In re 35% Automobile Supply Co.*, U. S. D. C., 247 Fed. 377.

51. **Executors and Administrators—Collections.**—Collection by administrator de bonis non with will annexed, of fund over which general power of appointment was given testator by his mother, and conversion of fund into cash, was not collection of "new assets" within Rev. Laws, c. 141, §§ 11, 18, as to extension of time for creditors' actions against administrators by receipt of "new assets," etc.—*Shattuck v. Burrage*, Mass., 118 N. E. 889.

52. **Presumption.**—Where mother-in-law of deceased resided with him and her daughter, rendering household services, it will be presumed that such services were rendered gratuitously, and to recover there must be proof of express contract or of facts and circumstances

for which contract for compensation can be implied.—*Zuhn v. Horst*, Wash., 170 Pac. 1033.

53. **Fraud—Imitations.**—Where oleomargarine colored in imitation of butter is sold in Illinois, and delivered by the seller to the purchaser in Missouri, the seller is not liable to a prosecution for keeping colored oleomargarine for sale in violation of Rev. St. 1909, § 651.—*State v. Swift & Co.*, Mo., 200 S. W. 1066.

54. **Fraud—Laches.**—Where vendors positively represented that tract contained specified acreage and purchaser did not ascertain shortage for over four years until he moved on the land and started to clear it, delay in suing for the fraud held not laches.—*Stone v. Burns*, Tex., 200 S. W. 1121.

55. **Fraudulent Conveyances—Intent.**—In creditors' suit wherein defendant's title to Kansas land, consideration for which was paid by her husband, was attacked, evidence held insufficient to show that husband caused title to land to be conveyed to defendant wife with actual intent to hinder, delay or defraud present or subsequent creditors.—*Anderson v. Hultberg*, U. S. C. C. A., 247 Fed. 273.

56. **Gifts—Evidence.**—A gift whereby the estate of a decedent is depleted, if not in writing, should be proved by disinterested witnesses, and the evidence must be definite, clear and convincing.—*In re Housman's Estate*, N. Y., 169 N. Y. S. 277.

57. **Intent.**—Where owner of bank deposits caused them to be put in names of herself and niece, and gave deposit books to niece on latter's promise to return them, there being no intention to make gift, as between owner and niece, money belonged to former.—*Bradford v. Eastman*, Mass., 118 N. E. 879.

58. **Intent in Delivery.**—Delivery of certificate of stock, with intention of making gift of shares evidenced thereby, is ordinarily treated as valid, completed gift and courts will enforce transfer in suit in equity.—*In re 35% Automobile Supply Co.*, U. S. D. C., 247 Fed. 377.

59. **Habeas Corpus—Appeal and Error.**—Where defendant contended that he could not be convicted of felony for his theft of motor car, but only of misdemeanor, he is entitled to obtain relief from conviction of felony by appeal, and not by habeas corpus.—*Ex parte Jackson*, Tex., 200 S. W. 1092.

60. **Indictment and Information—Synonymous Terms.**—Terms "house of ill fame," "bawdy house," and "brothel" being synonymous, indictment charging keeping of all three resorts charges but one offense.—*United States v. Casey*, U. S. D. C., 247 Fed. 362.

61. **Insurance—Burden of Proof.**—Where complaint alleged defendant insurer's refusal to accept premiums unless insurer consented to unlawful lien being placed upon policy, it was unnecessary to allege or prove offer on insured's part to perform contract.—*Federal Life Ins. Co. v. Weedon*, Ind., 118 N. E. 842.

62. **Indemnity Policy.**—Under policy indemnifying plaintiff, held, defendant was not liable for damages paid by plaintiff to elevator passenger injured while elevator was being operated by employee under age fixed by law, and contrary to provision of policy, although accident was due to structural defect.—*Fidelity & Casualty Co. of New York v. Palmer Hotel Co.*, Ky., 200 S. W. 923.

63. **Iron Safe Clause.**—That insured did not comply with iron safe clause of fire policy, etc., is no defense to action for premium on renewal policy.—*Security Loan & Investment Co. v. Etheredge*, S. C., 95 S. E. 109.

64. **Statutory Construction.**—Under Comp. Laws 1913, § 6548, breach of a provision making policy void if insured, without insurer's endorsement and consent, obtains other insurance, does not make policy void, but voidable only.—*Yusko v. Middlewest Fire Ins. Co. of Valley City*, N. D., 166 N. W. 539.

65. **Landlord and Tenant—Sublease.**—Instrument held sufficient as a sublease, though informal in character, not using the words "let" or "demise," and not describing the property by reference to a map, or in any usual manner.—*Baranov v. Scudder*, Cal., 170 Pac. 1122.

66. **Libel and Slander—Importing Felony.**—Words that clearly and unequivocally import that the person accused is guilty of some felony or other crime of such turpitude as to render him liable upon indictment to some infamous punishment are actionable per se.—*York v. Mims*, Ky., 200 S. W. 918.

67. **Master and Servant—Course of Employment.**—Where intestate was injured while working on employer's barn under its orders and control and for its benefit, he was injured in course of his employment.—*Southwestern Surety Ins. Co. v. Curtis*, Tex., 200 S. W. 1162.

68. **Insanity.**—Insane person incarcerated in jail cell with another was liable civilly for his assault with knife upon his cell mate.—*Kusav v. McCorkle*, Wash., 170 Pac. 1023.

69. **Interstate Employment.**—Servants of interstate carrier while engaged in interstate commerce assumes all the ordinary risk of his employment which are known, or which could have been known by the exercise of ordinary care.—*Chicago, R. I. & P. Ry. Co. v. Hessenflow*, Okla., 170 Pac. 1161.

70. **Partial Loss.**—Where an employe lost the lens of an eye, but could see by use of an artificial lens, if he did not use the good eye at the same time, and could continue his work without loss in wages, there was no "loss of an eye," nor "loss of use of an eye," within Workmen's Compensation Law, § 15, subd. 3.—*Frings v. Pierce-Arrow Motorcar Co.*, N. Y., 169 N. Y. S. 309.

71. **Respondeat Superior.**—Where employe of defendant school district whose duty it was to deliver parcels on defendant's motorcycle took such motorcycle after working hours without permission and contrary to rules of school board for his own convenience, defendant was not liable for injuries to plaintiff from resulting collision.—*Babbitt v. Seattle School Dist.* No. 1, 170 Pac. 1020.

72. **Respondeat Superior.**—Where defendant allowed son-in-law, who was member of his family to drive his motorcar a few blocks as an accommodation, the son-in-law cannot be deemed agent of defendant; it appearing that defendant merely granted permission to use his car.—*Bolman v. Bullene*, Mo., 208 S. W. 1068.

73. **Volunteer.**—If servant of products company was not a volunteer when killed by fall of derrick constructed to clean gas well, and if he was without knowledge of change of employers, and was working for defendant, it would be liable, though well was owned by another company.—*Brown v. Kittanning Clay Products Co.*, Pa., 102 Atl. 948.

74. **Warning.**—Where inexperienced laborer is employed to dig trench, without instruction or warning, master's failure to shore walls to prevent caving, as is customary and reasonably necessary to do, and to furnish material therefor, renders him liable.—*Moore v. Village of Naponee*, Neb., 166 N. W. 548.

75. **Workmen's Compensation Law.**—Where claimant, losing right eye prior to amendment of workmen's Compensation Law, § 15, subd. 6, by Laws 1915, c. 616, had previously injured left eye, so that it was useless, he was entitled to award for permanent total disability.—*Kriegbaum v. Buffalo Wire Works Co.*, N. Y., 169 N. Y. S. 307.

76. **Workmen's Compensation Act.**—Employer, who, whenever employer secured contract for installation of machinery, was required to go to the place for assembling same, was a "traveling employee," entitled to compensation under Workmen's Compensation Act for injuries on public highway while traveling in course of employment in automobile.—*London & Lancashire Indemnity Co. v. Industrial Accident Commission*, Cal., 170 Pac. 1074.

77. **Mechanics' Liens—Intervening Petition.**—Filing of an intervening petition, in action by owner to ascertain mechanics' liens, within 30 days after completion of a building, does not give a materialman or worker a lien when no valid notice of claim has been served, under Thom. Shan. Code, § 3540.—*Bird Bros. v. Southern Surety Co.*, Tenn., 200 S. W. 978.

78. Municipal Corporations—De Facto Officer.—Where one selected by board of aldermen of municipality as mayor entered into discharge of duties of such office, he was at least de facto officer, whose right to act could be questioned only by direct proceedings, and hence his right to vote in case of tie, in vote for city attorney cannot be drawn into question collaterally.—*Markham v. Simpson*, N. C., 95 S. E. 106.

79. Ordinance.—Under Baltimore Charter, § 6, any city ordinance, commissioner of street cleaning held to remove ashes and household refuse for the city in its private capacity, and hence it was liable for failure to require such removal as required by ordinance.—*Consolidated Apartment House Co. v. City of Baltimore*, Md., 102 Atl. 920.

80. Names—Variance.—That name of owner of stolen calf was J. L. P. and not J. R. P., as alleged, was not material variance.—*Phillips v. State*, Tex., 200 S. W. 1091.

81. Navigable Water—Submerged Land.—Lowlands covered with blackthorn, cottonwood, maple, and honey locust, with an undergrowth of vines and briars, are not a part of the lake on which they border, although submerged part of the year.—*State v. Parker*, Ark., 200 S. W. 1014.

82. Parent and Child—Emancipation.—If claimant of cotton levied on under execution against his father was emancipated at 17, and did business for himself and in his own name, and rented land and grew cotton at his own expense, cotton belonged to him, and not to his father.—*Turner v. Brown*, Tex., 200 S. W. 1161.

83. Failure to Provide.—Where misconduct of one in another state compelled his wife and children to leave him and they came to Kansas without his knowledge or consent, and she therein obtained a divorce on personal service and custody of children, requiring him to make payment for support, he may thereafter, while in another state, be guilty of violation of Gen. St. 1915, § 3410, by failing to provide for children.—*State v. Wellman*, Kan., 170 Pac. 1052.

84. Principal and Agent—Imputability.—Knowledge of agent who had charge of parcel of land and as attorney in fact executed conveyance for principal as to appurtenances of land conveyed is imputable to principal.—*Gartlan v. C. A. Hooper & Co.*, Col., 170 Pac. 1115.

85. Railroads—Last Clear Chance.—In action for death of infant run down by train, fact that engineer, on discovering infant, did not reverse engine, does not show that he failed to use all means at hand to stop train; it appearing that he cut off power, and evidence showing that to reverse lever would have had no effect on checking train's speed.—*Chesapeake & O. Ry. Co. v. Price's Adm'r*, Ky., 200 S. W. 927.

86. Look and Listen.—Testimony by plaintiff, who was struck in nighttime by train coming down grade by force of gravity merely, and which bore no light, locomotive coming tender first, that he stopped, looked, and listened, cannot be rejected as contrary to physical facts, and verdict by jury based thereon overturned.—*Philadelphia & R. Ry. Co. v. Skerman*, U. S. C. A., 247 Fed. 269.

87. Nuisance.—A roundhouse constituting a nuisance, it was no defense to railroad in action for damages therefrom that it was more convenient to construct and operate it at that place than another, that in constructing and operating it the railroad neither "took" nor "destroyed" plaintiff's property, or that the railroad was not negligent in constructing or operating it.—*Texas & P. Ry. Co. v. Taylor*, Tex., 200 S. W. 1117.

88. Sales—Completion of Sale.—Where a contract of sale is made for a specific article to be charged for, and where there is nothing more to do except to deliver it and collect the price, the sale is complete without delivery or payment.—*State v. Swift & Co.*, Mo., 200 S. W. 1066.

89. Street Railroads—Right of Way.—Under Brooklyn ordinance giving right of way to vehicles going north or south over those going east or west, if a west-bound automobile got within the square formed by the intersection of two

streets before the trolley car reached such square, the trolley car would not, as a matter of law, have the right of way.—*Boston Ins. Co. v. Brooklyn Heights R. Co.*, N. Y., 169 N. Y. S. 251.

90. Surety Company—Estoppe.—Where claimant against the surety of a jitney bus driver knew others injured in the same accident were asserting their claims, and failed to act diligently, leaving the surety to act in the belief that he had abandoned his claim, and pay other claims exhausting the bond, he was estopped from holding the surety.—*Darrah v. Lion Bonding & Surety Co.*, Tex., 200 S. W. 1101.

91. Trusts—Evidence.—Where title of defendant to Kansas land was attacked on ground that property was paid for with moneys obtained from mining claim, which husband, who paid consideration, held in trust for complainant's assignor, evidence held insufficient to establish trust.—*Anderson v. Hultberg*, U. S. C. C. A., 247 Fed. 273.

92. Vendor and Purchaser—Implied Agreement.—Sale, or reasonable effort to sell, in a reasonable time, is implied as term of agreement, on which plaintiffs conveyed to defendant for money advanced, that when he sold he would divide the excess proceeds with them.—*Campbell v. Kennedy*, Cal., 170 Pac. 1107.

93. Promoter.—Where land company sold land to promoter who agreed to make improvements, subdivide land, and reimburse company from payments made to him by purchasers, and he defaulted, land company, in absence of collusion with him, was not liable for fulfillment of his contracts with purchasers.—*Vera Land Co. v. Metcalf*, Wash., 170 Pac. 1012.

94. Waters and Water Courses—Private Water Rights.—Plaintiff's right to establish her private water right against public served by defendant corporation would be measured not by amount claimed by her predecessors, but by amount which had been actually taken for beneficial use on land to which appurtenant.—*Hudson v. Ukiah Water & Improvement Co.*, Cal., 171 Pac. 93.

95. Rates.—Where a water company declares that it will not furnish water except at a particular rate, a landowner entitled to water at a lower rate need not demand any specific amount or tender payment.—*Henrich v. South Feather Land & Water Co.*, Cal., 170 Pac. 1135.

96. Wills—Construction.—Where will devised life estate to widow with remainder to H. and W. in equal shares, but if W. dies without issue his share to go to H., held, that W. succeeded to full fee-simple title, where the life tenant and H. died after death of testator, and H.'s sole heirs conveyed to W. who is married and has children.—*Wichard v. Craft*, N. C., 95 S. E. 94.

97. Construction.—Will directing wife to set aside from surplus of annual net income portion she deems proper to create sinking fund for grandchildren, until \$5,000 accumulates, any deficit to be made out of estate, to be divided among beneficiaries equally, grants general legacy, payable from personality, unless grounds for charging it on realty are shown.—*In re Lynch's Will*, N. Y., 169 N. Y. S. 321.

98. Construction.—A will, the residuary clause of which provides an apportionment of the residue among "immediate relatives," held to apply to blood relatives only.—*McMenamy v. Kampelmann*, Mo., 200 S. W. 1075.

99. Domicile.—Where testatrix died domiciled in town in Massachusetts, primary proof of will presumably should have been made in county where she died, but Surrogate's Court of New York also had jurisdiction to admit will to probate, where she owned bonds of New York corporations, a New York mortgage bond, and an interest in her deceased husband's realty in New York.—*Morrison v. Haas*, Mass., 118 N. E., 893.

100. Res Judicata.—That a guardian had been appointed for a testator on application, stating that he was of unsound mind, is not conclusive against testamentary capacity.—*In re Hanrahan's Estate*, Iowa, 166 N. W. 529.

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JUDGES AS SPECIALISTS AND COURTS AS QUASI-COMMISSIONS.

There has come down to us from English days the theory of specializing in the practice of law. In congested centers of population lawyers naturally divided themselves into groups as the business and jurisdiction of courts concerned themselves distinctively in aspects of jurisprudence.

That great novel by Dr. Samuel Warren, "Ten Thousand a Year," well portrays the need a serjeant or a king's or queen's counsel—the leader in an array of lawyers in a case—had of assistants for its effective presentation to a court. There is the firm of Quirk, Gammon and Snap, the attorneys, the barristers and the proctors, each proficient along his line, with the great leader to be informed and prompted as the cause unfolded in the examination of witnesses and the introduction of documentary evidence.

This novel told with realistic force of the progress and ending of a civil trial, but under the system in England it is easy to imagine, that a *cause celebre* in criminal annals in its prosecution and defense might call for the aid of lawyers from many subordinate courts, with whose practices and precedents they had familiarized themselves. We think some of our fictional literature will bear us out in this, but at the moment we cannot recall any particular story.

But, at all events, the practice in England shows, that the administration of justice made requisition upon study and accumulated experience along particular lines, to keep application of great underlying principles within practically tested confines. It was, therefore, not from study alone, but also from experience following thereafter, that our common law evolved

the expert. There might be some debate as to whether its practice pursued the expert theory far enough, but that this common sense idea had its influence is not to be disputed.

As was the practice in England, so, measurably, it has been ours. The acceptance of the judgment of special tribunals when operating strictly within the lines of conferred powers, has been, not grudging, but welcome. Our courts have said this theory had its recognition in our common law.

United States Supreme Court speaks of public service commissions as tribunals "appointed by law, and informed by experience," and gives to their findings the status of *prima facie* truth. Collier on Public Service Companies, § 177. These commissions, as do many other bodies elected to care for particular concerns in the growing complexity of modern civilization, bespeak, or at least, suggest, the need for further specializing in our courts.

Our probate administration, though an ancient head in jurisprudence, is but a special court. Its judgments are esteemed as being *in rem* and binding on the world in a way that judgments of courts of general jurisdiction do not require notice, actual or constructive, in order to bind. So it is in guardianship and *non compus mentis* cases. It would be strange indeed, if it might be thought that this sort of tribunal were not deemed expert and that its ministers were not informed by special study and experience.

Our common law history has not taught us to look upon courts wholly as insen-sate tribunals. They have powers, but they are guided as to the exercise thereof with an intelligent discretion. There is recognition of the human equation in their acts. It is implied that this element ought to be informed, so as to be expert. Therefore, generally, it is prescribed that no one may speak for a court who is not an expert in the law.

But of what use is knowledge or experience to make one an expert, unless it is along the line of things whereof a court is to render its judgments?

In volume 1, number 5 of Journal of the American Judicature Society, we note that in many of the large cities of this country municipal courts have been provided for so as to make use of the knowledge and experience of which we have been speaking. More precisely it is to make efficient, through particular qualifications, as in study or experience of judges, the administration of the law.

We approve, upon the whole, such an idea, but at this time we like not the word "efficiency." It has taken on a sinister sense. It bars or tends to bar out, the human equation of which we speak above. It smacks of that old thing, that often in our experience we know to have put up the bars against justice. We have called it technicality.

All trades acquire words peculiar thereto and in some of them these words have become shibboleths to perpetuate wrong. When a mind becomes so enamored of the processes it follows, that it will go forward even to destruction, it is a technical mind. It will murder *recundum artem*, without a qualm and repent of doing justice in unused ways.

Therefore we are not by any means at the end of the row in seeking for justice, when we have found professional efficiency. Many of our commissions have improved things, just as in departments of a great business, fitness of managers in each has helped to an unexceptionable result. But government is not like a great commercial or manufacturing business. The human equation may not be so very necessary in the latter as in the former, nor strictly, the moral equation either.

It has been said "honesty is the best policy," but honesty that is policy only is not true honesty. Like Rip Van Winkle's sworn abstinence from liquor, it may be apt to slip.

NOTES OF IMPORTANT DECISIONS.

APPEAL AND ERROR — ARGUMENT APPEALING TO CHRISTIANITY IN A CRIMINAL CASE.—In *State v. Shoemake*, 78 So. 240, decided by Supreme Court of Louisiana, the rule of error not appearing to be harmful was applied, in the affirming of a verdict of murder.

This case was first reversed, but on rehearing, this conclusion was changed, both opinions being agreed to by the entire bench.

In the original opinion the fact of opening the court with prayer is alluded to as being unusual, the Court saying "there may be no harm in this, although we have never heard of such a thing being done before." Then the court speaks of testimony showing decedent had joined the church and thereafter continued to attend church meetings and the district attorney winds up a fervid appeal to the jury by saying that they are called upon to say "whether there is anything in Christian experience and Christianity and whether Christianity in this parish is dead." The court declared that the trial ought to have concluded "in the clear, unmisted light of the law and the evidence." But the bill of exceptions fails to show that any of the things complained of were objected to. The court first thought the safer course was to grant a new trial.

In the opinion on rehearing the court shows that it was informed by the trial judge that it had always been his custom to open court with prayer, but the prayer was general in its terms. It was thought this was no more objectionable than the cleric on opening court to say: "God save the state and this honorable court."

Of the remarks of the district attorney, it was said they were merely "general in terms," and as to these and the objectionable statements about decedent's church membership and attendance, it was said no objection was made by accused.

It was said also that: "The judge states in his per curiam to the bill of exceptions that defendant was charged with the murder of a female child some 16 years of age. Yet the verdict found him guilty without capital punishment." The Supreme Court, therefore, concludes that, if the remarks of the district at-

torney had any effect, that effect was favorable to defendant.

The rule ought to be more or less rigidly enforced which requires timely objection to be made to errors in the course of a trial. But there is such a thing as atmosphere in a case, which neither can be clearly defined or availably objected to. If the judge is sympathetically inclined toward the atmosphere, the more persistently an accused objects, the heavier the fog of prejudice settles down upon the proceedings in a trial. Courts take judicial cognizance of things sometimes less evident than those in this case, and we make bold to say that no prejudice works less intelligently than religious frenzy or hysteria. Of all unreasoning states of mind that is the chief, when its introduction is where it has no right to be.

MUNICIPAL CORPORATIONS — ORDINANCE REQUIRING INSPECTION OF LIQUOR SHIPMENTS IN INTERSTATE COMMERCE.—In *West Jersey & S. R. R. Co. v. Millville*, 103 Alt. 245, decided by New Jersey Supreme Court of Errors and Appeals, it was held that the Webb-Kenyon Liquor Act did not contemplate ordinances of a municipality regarding shipments of liquor where the ordinances are merely regulatory for license, and not prohibitive, purposes, and therefore an interstate carrier was within its rights in disregarding the ordinance in so far as it made it unlawful for such a carrier to deliver liquor to any club, lodge, etc., or to fail to keep open for inspection for police officers of a city consignments of such liquor.

The court said: "The act of Congress of 1913, commonly known as the Webb-Kenyon Act, prohibited the shipment or transportation of intoxicating liquor of any kind in interstate commerce, when intended to be received, possessed, sold or used in violation of the law of the State." Then are cited cases sustaining this statute.

The court also should have cited a still later case, that of *Seaboard A. L. R. Co. v. North Carolina*, 38 Sup. Ct. 96, where the same sort of statutory regulation that the ordinance attempts to provide for, was sustained by U. S. Supreme Court, under the Webb-Kenyon Act.

The court then goes on to inquire whether the ordinance is a law of the State, saying

it is not claimed that any general law of the State is violated. Furthermore, distinction is drawn between regulation and prohibition, saying the former does not include the latter.

After some reasoning along these lines the court says: "The ordinance undertakes to extend the prohibition to sales completed outside of Millville and to prevent men from shipping into Millville property to which they have acquired a valid title elsewhere. In short, the attempt is to extend the power of Millville over property throughout the State or even the world. The legislative authority for such action must be clear. Here there is nothing in the charter to show that the Legislature meant to confer so extensive a power."

More pertinent it seems to us would it be to inquire whether Congress intended to vest in local governmental bodies of a State such as power, though, if State authority did not also so intend, Congress would acquiesce in a State's view of its laws. The States accept so much of the Webb-Kenyon Act as they care.

We see nothing in the claim, that the ordinance intends to affect title acquired elsewhere. The ordinance is for use of a thing and police power may affect that use in a city. If an ordinance is in regard to distribution of an article it may be valid, if police power is reasonably exercised and this though it be brought to the city by a carrier in interstate commerce.

ATTORNEY AND CLIENT—WRONG ETHICAL VIEW AS REASON FOR REFUSAL TO ADMIT TO PRACTICE.—*Re Bowers*, 200 S. W. 821, decided by Tennessee Supreme Court, confirms a recommendation of the State Board of Law Examiners, that an applicant for a license to practice law be rejected, because, though the applicant was of good moral character and was graded upon his examination sufficiently high to entitle him to a license, yet he had such a wrong conception of professional ethics, that license should be denied to him.

The particular offending of ethical conduct by the applicant was, that theretofore he had solicited business for members of the bar, and upon being remonstrated with for so doing "he devised a form of power of attorney by the terms of which the prospective litigant em-

ployed Bowers as attorney in fact and agreed to pay 50 per cent of whatever amount should be realized from the proposed litigation to Bowers as compensation for his services."

It is to be noted, that all of this was by applicant as an individual and not as a practicing lawyer, but the report shows that the applicant did not "know anything about the ethics of the legal profession," and thought it was "a wide open business like selling cigars, and if he could get work to do, it was up to him to do it." It may be, therefore, that by this he meant to continue to use the same methods he pursued as an attorney in fact after he should become an attorney at law.

The court said: "The board reports that the evidence shows that Mr. Bowers is a man of good general reputation, but it is of the opinion, after an examination of the testimony, that he has failed to conceive the nature of the duties of an attorney, and has no proper conception of the ethics of the profession; and for these reasons the board is of the opinion and so certifies to this court that he should not be admitted to practice law." The court concurs with the board, and denies admission to the applicant. If it were right to deny admission for any such reason, it might also be right to expel for a like reason. We do not believe many would hold that this could be done.

While we believe that such contracts as applicant was securing should be deemed unconscionable, and, therefore, unethical, yet it seems to us they are not *prima facie* void. They might be made voidable under a rule of court and, even it might be required of attorneys that they should not reserve to themselves any compensation in such large proportion. While courts have said they are not concluded by such contracts, though apparently fairly entered into, from saying what an attorney is entitled to receive for his services in a particular case, they yet have not condemned them as vicious.

We agree that a court may say, under a rule of court previously adopted, what practices may be stamped as so unethical as to undermine reputation, and distinguish the latter as being for professional or general purposes, but until such a rule is made, the maximum *expresio unius, exclusio alterius* should apply. One's right to follow a calling should not be denied by a rule that may be arbitrary or comes into effect after he has proven his lawful right to a privilege. *Ex post facto* law is as vicious from a civil, as a criminal, standpoint.

CRIMINAL LIBEL—LIBELING A CLASS.*

Indictment for criminal libel and criminal slander is a procedure which furnishes the prosecuting officers in every county in the Union with an effective weapon, which should be vigorously used, for the entire suppression of and elimination from our midst of the many vicious elements which are threatening the government and civilization itself; such as anarchists, "reds," Bolsheviks, rabid and government-destroying socialists, the infamous Industrial Workers of the World, and other class of agitators and calumniators of that ilk. Criminal libel—*libellus famosus infamatoria scriptura*—is a scandal, or abuse, or villification, or vituperation written or printed, or expressed by signs, symbols,¹ and the like,² and may be directed:

1. Against God and the Christian religion;
2. Against morality;
3. Against the constitution and laws of government;
4. Against the president or governors;
5. Against the legislatures or congress;
6. Against public officers;
7. Against the magistrates or judges, and the administration of justice;
8. Against private individuals; or
9. Against the officers of foreign governments or foreigners of distinction.

They are classified (1) as blasphemous, against God and the Christian religion; (2) plain libel, against an individual or a class; and (3) seditious libels, including all the other classes of libels above designated.³

Criminal Slander is to be distinguished from criminal libel in that (1) it is not so heinous an offense inasmuch as the

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(1) Lamb. Sax. Law 64; Bract. lib. 3, ch. 36; 3 Co. Inst. 174; Case de Libellis Famosis (Scandalous Libels), 5 Co. 125, 77 Eng. Repr. 250; R. v. Bear, 1 Ld. Raym. 416, 91 Eng. Repr. 1175, and 2 Salk. 417, 91 Eng. Repr. 363 (*libellus famosus*).

(2) 1 Kerr's Criminal Procedure, §§ 917-920. (3) Id. § 904.

words, being spoken merely, are not of so enduring a character and do not reach so large an audience as when written or printed, and (2), in the case of the slander of an individual, however scurrilous, it is not the subject of indictment, unless it tends directly to a breach of the peace.⁴ Criminal slanders are divisible into the same classes as criminal libels are divided above, and where falling under the "seditious" class, are equally indictable with seditious libels; and thus prosecuted will reach and punish, and effectually silence the scurrilous and vituperative "soap-box" orator nuisance—individuals blatantly inveighing against laws, governments, officials and the like, to the common nuisance of all civilized communities as well as the jeopardy of individual rights, private property, and government itself.

Freedom of Speech and Liberty of the Press, those grand privileges and ideals of the American government, secured alike by federal and state constitutions, are privileges and rights in nowise infringed or affected by the prompt indictment and vigorous prosecution for seditious criminal libel and seditious criminal slander herein recommended. Freedom of speech and liberty of the press do not mean an unbridled license to say and write or publish whatever evil-minded persons may feel inclined, any more than the equally constitutional right of free assembly authorizes and legalizes unlawful assemblies, riots, routs, and the like. Liberty does not mean unrestrained license. There is a legal obligation on the part of all those who speak and write and publish to do so in such a manner as not to offend against public decency, public morals, public laws, and not to scurrilously and vituperatively attack public officers, the administration of justice, the laws of the land, or the government; and a failure

(4) Russ. on Crimes (9th ed.) 343. See: R. v. Langley, 6 Mod. 125, 87 Eng. Repr. 882; R. v. Bear, 2 Salk. 417, 91 Eng. Repr. 363, and 1175; Thornley v. Lord Kerry, 4 Taunt. 355, 13 Rev. Rep. 626, 128 Eng. Repr. 367; Villers v. Monsley, 2 Wils. 408, 95 Eng. Repr. 886.

in these particulars, and offending against any one or all of these things, renders a person subject to indictment and prosecution. And all such offenders, in the due and orderly administration of justice and the criminal laws of the land, should be promptly indicted, vigorously prosecuted, and adequately punished, notwithstanding, and in protection of, legitimate free speech and liberty of the press. The treatment of this question does not fall within the scope of the present article, and it is sufficient to say in this place that the foregoing principles and assertions are amply borne out by the adjudicated cases in this country and England.⁵

(5) See, among other cases, that of the "Haymarket" anarchists of Chicago.—Spies v. People, 122 Ill. 1, 3 Am. St. Rep. 320, 6 Am. Cr. Rep. 570, 12 N. E. 865, 17 N. E. 898; petition for writ of error dismissed, 123 U. S. 143, 31 L. Ed. 80, 8 Sup. Ct. Rep. 21. Also the cases of Herr Most, the notorious German anarchist.—People v. Most, 128 N. Y. 108, 26 Am. St. Rep. 457, 8 N. Y. Cr. Rep. 273, 27 N. E. 970, affirming 7 N. Y. Cr. Rep. 376, 8 N. Y. Supp. 625; People v. Most, 171 N. Y. 428, 58 L. R. A. 509, 16 N. Y. Cr. Rep. 555, 64 N. E. 175, affirming 71 App. Div. 160, 16 N. Y. Cr. Rep. 392, 75 N. Y. Supp. 591, which affirmed 36 Misc. 139, 16 N. Y. Cr. Rep. 105, 73 N. Y. Supp. 220; R. v. Most, L. R. 7 Q. B. Div. 244. See, also, in this connection, Coleman v. McLennan, 78 Kan. 711, 130 Am. St. Rep. 390, 20 L. R. A. (N. S.) 369, 98 Pac. 281; People v. Wallace, 85 App. Div. (N. Y.) 170, 17 N. Y. Cr. Rep. 432, 83 N. Y. Supp. 130; United States ex rel. Turner v. Williams, 154 U. S. 279, 48 L. Ed. 979, 24 Sup. Ct. Rep. 719. Constitutional provision guaranteeing liberty of the press does not justify printing libels.—See: State v. Sykes, 28 Conn. 225; State v. McKee, 73 Conn. 18, 49 L. R. A. 542, 46 Atl. 409; Storhm v. People, 160 Ill. 582, 43 N. E. 622; State v. Blair, 92 Iowa 28, 60 N. W. 486; In re Banks, 56 Kan. 242, 42 Pac. 693; Coleman v. MacLennan, 78 Kan. 711, 130 Am. St. Rep. 390, 20 L. R. A. (N. S.) 369, 98 Pac. 281; Levert v. Daily States Pub. Co., 123 La. 594, 131 Am. St. Rep. 356, 23 L. R. A. (N. S.) 726, 49 So. 206; Com. v. Holmes, 17 Mass. 336; State v. Pioneer Press Co., 100 Minn. 177, 117 Am. St. Rep. 684, 10 Ann. Cas. 351, 9 L. R. A. (N. S.) 482, 110 N. W. 867 (restricting publication of news as to executions); State v. Van Wye, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938; Hart v. People, 26 Hun 396; Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; In re Rapier, 143 U. S. 110, 36 L. Ed. 93, 12 Sup. Ct. Rep. 374; Arnold v. Clifford, 2 Summ. 238, Fed. Cas. No. 555; United States v. Harmon, 45 Fed. 414; Harmon v. United States, 50 Fed. 921; Hallam v. Post Pub. Co., 55 Fed. 456. English rule is the same.—See R. v. Brodlaugh, L. R. 2 Q. B. Div. 589, 21 Moak (Eng. Repr.) 269; reversed on another point, L. R. 3 Q. B. Div. 607; 28 Moak Eng. Rep. 482, 3 Am. Cr. Rep. 464; R. v. Hicklin, L. R. 3 Q. B.

Requisites of Indictments. In general, in criminal libel or criminal slander, as in every other criminal offense, sufficient must be alleged against the accused to make out a *prima facie* case, and the allegations must be sufficiently detailed and specific for this purpose, or they will be insufficient.⁶ The indictment or information must comply with the general rule in criminal pleading, requiring it to be certain and specific,

Div. 360; *In re Besant*, L. R. 11 Ch. Div. 508. "Constitutional liberty of speech and of the press, as we understand it, simply guarantees the right to freely utter and publish whatever the citizen may desire, and to be protected in so doing, provided always that such publications are not blasphemous, obscene, and scandalous in their character, so that they become an offense against the public, and by their malice and falsehood injuriously affect the character, reputation, or pecuniary interests of individuals. The constitutional protection shields no one from responsibility for abuse of this right. To hold that it did would be a cruel libel upon the bill of rights itself. The laws punishing criminal libel have never been deemed an infringement of this constitutional guarantee."—*State v. Van Wye*, 136 Mo. 227, 58 Am. St. Rep. 627, 37 S. W. 938. "It may as well be said here as elsewhere that it is a radical misconception of the scope of the constitutional protection to indulge the belief that a person may print and publish *ad libitum*, any matter, whatever the substance or language, without accountability to law. Liberty in all its forms and assertions in this country is regulated by law. It is not an unbridled license. Where vituperation or licentiousness begins, liberty of the press ends."—*United States v. Harmon*, 45 Fed. 414. Prohibiting addresses in public parks and other public places is not an infringement of the freedom of speech.—*Fitts v. Atlanta (City of)*, 121 Ga. 567, 104 Am. St. Rep. 167, 67 L. R. A. 803, 49 S. E. 798. *Com. v. Abrahams*, 156 Mass. 57, 49 Am. Rep. 5, 30 N. E. 79; *Com. v. Davis*, 162 Mass. 510, 44 Am. St. Rep. 389, 26 L. R. A. 712, 39 N. E. 113; *Love v. Phelan*, Judge of Recorder's Court, 128 Mich. 550, 55 L. R. A. 621, 87 N. W. 785; *In re Cox*, 129 Mich. 636, 89 N. W. 440; *In re Anderson*, 69 Neb. 690, 5 Ann. Cas. 421, 96 N. W. 149; *Ex parte Warfield*, 40 Tex. Cr. Rep. 413, 76 Am. St. Rep. 724, 50 S. W. 933.

(6) *State v. Lomack*, 130 Iowa 79, 106 N. W. 386; *State v. O'Hagan*, 73 N. J. L. 209, 63 Atl. 95; *Melton v. State*, 22 Tenn. (3 Humph.) 389; *R. v. Gregory*, 8 Ad. & E. N. S. (8 Q. B.) 508, 55 Eng. C. L. 507; *R. v. Dean of St. Asaph*, 21 How. St. Tr. 847, 1044; *R. v. Rossewell*, 2 Show. 411, 89 Eng. Repr. 1012. Charging imputing want of chastity to a woman, an indictment or information which alleges accused declared that a man named was "monkeying" with the woman and "doing what he pleased with her, meaning thereby that he was having carnal knowledge of her," is good.—*Dickson v. State*, 34 Tex. Cr. Rep. 1, 53 Am. St. Rep. 694, 28 S. W. 815, 30 S. W. 807.

and sufficient to set forth, in a plain and brief manner, every fact necessary to constitute the offense sought to be charged against the accused.⁷ It is not necessary to allege in an indictment or information facts which the law will necessarily infer upon the proof of other facts which are alleged.⁸ Inasmuch as the statutory definition of criminal libel, or of criminal slander, governs, it is immaterial whether the words alleged to be libelous, or slanderous, are so *per se* or not,⁹ it being sufficient to charge that the libel is "as follows," and then set it forth verbatim, with sufficient innuendoes, and this alleges the libel or slander with sufficient certainty.¹⁰

Libel of a Class. A criminal action for the libel, or for the slander, of a class differs in a very material regard from a civil action for the same libel or slander. The rule in civil cases is that one of a class can not maintain a civil action against a charge of either libel or slander where the libel or slander charged against the class is so general as to designate all persons who may belong to the designated class collectively, by a single name, irrespective of geographical limitations, political divisions, place of abode, or any other similar restrictions,¹¹ and there is nothing in the language employed which, by proper innuendo or colloquium, can be made to apply to any particular class.¹² Thus, it has been said that

(7) *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627; *Brooke v. State*, 154 Ala. 53, 45 So. 622; *Tracy v. Com.*, 87 Ky. 578, 9 S. W. 822; *Richardson v. State*, 66 Md. 205, 7 Atl. 43; *People v. Jones*, 67 Mich. 544, 35 N. W. 419; *State v. Buck*, 43 Mo. App. 443; *People v. McLaughlin*, 33 Misc. 691, 15 N. Y. Cr. Rep. 302, 68 N. Y. Supp. 1108; *Lawton v. Territory*, 9 Okla. 456, 60 Pac. 93; *Com. v. Chambers*, 15 Phila. 415; *State v. Henderson*, 1 Rich. L. 179.

(8) *R. v. Munslow*, 18 Cox. C. C. 112, 10 Am. Cr. Rep. 480.

(9) *People v. Seeley*, 139 Cal. 118, 72 Pac. 834; *State v. Elder*, 19 N. M. 393, 148 Pac. 482.

(10) *People v. Seely*, 139 Cal. 118, 72 Pac. 834; *Clay v. People*, 86 Ill. 147, 2 Am. Cr. Rep. 381.

(11) See note, 23 L. R. A. (N. S.) 726.

(12) *Comes v. Cruce*, 85 Ark. 79, 14 Ann. Cas. 327, 107 S. W. 185; *Hardy v. Williamson*, 86 Ga. 551, 22 Am. St. Rep. 479, 12 S. E. 874; *Merrill v. Post Pub. Co.*, 197 Mass. 185, 83 N. E. 419; *Lewis v. Soule*, 3 Mich. 514; *McGraw v. Detroit*

if a man were to write or publish that "all lawyers are thieves," without something in addition pointing out some particular lawyer, no lawyer could maintain a civil action thereon.¹³ The rule is different where the language restricts the designation of a class so as to point out a particular locality.¹⁴

In *Criminal Libel*, or criminal slander, the rule is that a criminal proceeding may be instituted at the instance of any individual of the class defamed,¹⁵ for, as Mr. Chief Justice Cullen remarks, in *People v. Eastman*,¹⁶ the foundation of the theory upon which libel is made a crime is that by provoking passions of persons libeled, it excites them to violence and a breach of the peace, and for that reason a criminal prosecution can be maintained where no civil action would lie.¹⁷ While this language is

purely obiter,¹⁸ it but restates the well-established principle of criminal libel. The same observation is to be made regarding the identical remarks of Mr. Justice Smith, in *Palmer v. City of Concord*,¹⁹ in which case the libel before the court was a charge of cowardice and ill treatment of noncombatants on the part of the whole Union Army, and the judge, after saying the libel might be prosecuted criminally adds: "It is obvious that a libelous attack on a body of men, though no individuals are pointed out, may tend as much, or more, to create public disturbances as an attack on one individual; and a doubt has been suggested whether the fact of numbers defamed does not add to the enormity of the act." And the same is true of the case of *Sumner v. Buel*,²⁰ in which a majority of the court held that a civil action could not be maintained by an officer of a regiment for a publication reflecting on the officers of the regiment generally, but add: "The offender in such case, does not go without punishment. The law has provided a fit and proper remedy, by indictment; and the generality and extent of such libels make them more peculiarly public offenses."²¹

General Libel Upon a Body of Men, indictment lies, though no individuals are pointed out, because such writings and publications have a tendency to inflame and disorder society, and for that reason are within the cognizance of the criminal law.²² Thus, it has been said to publicly charge the street-car conductors of a certain city with being pimps, and averring that they would sell the virtue of their sisters for a drink, is an indictable libel.²³ And a

(18) The point involved did not embrace the general principle, which was in nowise before the court. The prosecuting attorney had plainly blundered by indicting the accused under a section of the New York Penal Code, which had no application to the offense charged.

(19) *Palmer v. Concord (City of)*, 48 N. H. 211, 97 Am. Dec. 605.

(20) *Sumner v. Buel*, 12 Johns. (N. Y.) 475.

(21) *R. v. Hector Campbell*, K. B., Hil. Term. 1808, cited in Holt on Libel 249, 250.

(22) Holt on Libel 237; *Le Fanu v. Malcomson*, 1 H. L. C. 637, 9 Eng. Repr. 910.

(23) *Jones v. State*, 38 Tex. Cr. Rep. 364, 70 Am. St. Rep. 751, 43 S. W. 78.

Free Press Co., 85 Mich. 203, 48 N. W. 500; Watson v. Detroit Journal Co., 143 Mich. 430, 8 Ann. Cas. 131, 5 L. R. A. (N. S.) 480, 107 N. W. 81; Stewart v. Wilson, 23 Minn. 449; Kenworthy v. Journal Co., 117 Mo. App. 237, 93 S. W. 882; Palmer v. Concord (City of), 48 N. H. 211, 97 Am. Dec. 605; Sumner v. Buel, 12 Johns. 475; Miller v. Maxwell, 16 Wend. 9; Ryckman v. Delavan, 25 Wend. 186, reversing White v. Delavan, 17 Wend. 49; People v. Eastman, 188 N. Y. 478, 11 Ann. Cas. 302, 81 N. E. 459; Hauptner v. White, 81 App. Div. 153, 80 N. Y. Supp. 895; R. v. Alme, 3 Salk. 224, 91 Eng. Repr. 790.

(13) *Eastwood v. Holmes*, 1 Fost. & F. 347.

(14) See: *Chandler v. Holloway*, 4 Port. 17; *Wofford v. Meeks*, 129 Ala. 349, 87 Am. St. Rep. 66, 55 L. R. A. 214, 30 So. 625; *Schomberg v. Walker*, 132 Cal. 224, 64 Pac. 290; *Byers v. Martin*, 2 Colo. 605, 25 Am. Rep. 755; *Forbres v. Johnson*, 50 Ky. (11 B. Mon.) 48; *Ellis v. Kimball*, 33 Mass. (16 Pick.) 132; *Gidney v. Blake*, 11 Johns. 54; *Weston v. Commercial Advertiser Assoc.*, 184 N. Y. 479, 77 N. E. 660; *Woods v. Gleason*, 18 App. Div. 401, 46 N. Y. Supp. 200; *Maybee v. Fisk*, 42 Barb. 326; *Dwyer v. Fireman's Journal Co.*, 11 Daly 248; *Ryer v. Fireman's Journal Co.*, 11 Daly 251; *Cook v. Reif*, 52 Sup. Ct. (20 Jones & S.) 302, 8 N. Y. Civ. Proc. Rep. 133; *McClean v. New York Press Co.*, 19 N. Y. Supp. 262; *Fenstermaker v. Tribune Pub. Co.*, 12 Utah 439, 35 L. R. A. 611, 43 Pac. 12, 13 Utah 532, 35 L. R. A. 611, 45 Pac. 1197; *Smith v. Utley*, 92 Wis. 133, 35 L. R. A. 620, 65 N. W. 744; *Foxcroft v. Lacy*, 1 Hobart 89, 80 Eng. Repr. 239; *Shearlock v. Beardsworth*, 1 Murr. (Sch.) 196.

(15) *People v. Eastman*, 188 N. Y. 478, 11 Ann. Cas. 302, 81 N. E. 459, affirming 116 App. Div. 922, 101 N. Y. Supp. 1137.

(16) *Id.*

(17) Citing *State v. Brady*, 44 Kan. 435, 21 Am. St. Rep. 296, 24 Pac. 948; *Palmer v. Concord (City of)*, 48 N. H. 211, 97 Am. Dec. 605; *Sumner v. Buel*, 12 Johns. (N. Y.) 475.

scandal published of three of four persons is punishable at the complaint of one or more, or all of them.²⁴ Where the alleged publication is against a class of persons, it need not designate the names of the persons of that class.²⁵ A libel on one of the class, without designating him, is a libel on the whole, and may be so described in the indictment or information;²⁶ because where a paper is published equally reflecting upon a number of people, it reflects upon all, and readers, according to their different opinions, may so apply it.²⁷

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(24) Holt on Libel 237; R. v. Benfield, 2 Burr. 980, 97 Eng. Repr. 664; Le Fanu v. Malcomson, 1 H. L. C. 637, 9 Eng. Repr. 910.

(25) Jones v. State, 38 Tex. Cr. 364, 70 Am. St. Rep. 751, 43 S. W. 78.

(26) R. v. Jenour, 7 Mod. 400, 87 Eng. Repr. 1318.

(27) Id.

BRITISH WAR EMERGENCY LEGISLATION — RESTRICTIONS ON RENT AND MORTGAGES.

One of the most important of British war measures is the Act passed on the 23rd of December, 1915, preventing the increase of rent or interest on mortgages in the case of small dwelling houses. It is a signal example of drastic interference with the rights of property and the freedom of contract. Frankly admitted to be an Act passed in the interests of a certain section of the community, it has had results which are not all of them to the advantage of the class which it was designed to benefit. We propose to give a brief outline of its provisions, and conclude by pointing out some of its economic results.

The first provision of the Act is that where the rent of a dwelling house to which the Act applies, or the rate of interest on a mortgage of such dwelling house, is increased during the war above what is call-

ed the standard rent, or the standard rate of interest, the excess cannot be recovered. There is no contracting out. The "standard rent" is the rent on the 3rd of August 1914, or, if the house was not let at that date, the rent at which it was last let before that date, or if the house was let after the 3rd of August, 1914, the rent at which it was first let. The "standard rate of interest" is the interest payable on a mortgage in force on the 3rd of August, 1914, or the rate payable on a mortgage made since that date. Now let us notice the exceptions

(1) The Act does not apply to rent or interest which became due before November 25, 1915. (2) The landlord may charge additional rent at the rate of 6 per cent on the amount expended on the improvement of structural alteration of a house (not including decoration or repairs). (3) It is an increase of rent if any burden or liability previously borne by the landlord is shifted from the landlord to the tenant, and vice versa, any increase of rent in consequence of a transfer of burden from tenant to landlord is not an increase if on the whole the tenant benefits. Any dispute about these matters is to be settled by the County Court, and its decision is final.

(4) Where the landlord pays the rates, and not the occupier, any increase of rates charged to the occupier as rent by the landlord is not an increase of rent under the Act, and rates includes water rents and charges. (5) Where a notice calling in a mortgage unless a higher rate of interest should be paid was given before August 4 1914, the higher interest paid after the Act is not an increase under the Act. The dwelling houses included in the Act are a house, or a part of a house, let separately without any separate land other than a garden. The amount of the standard rent or the rateable value must not exceed

(a) Thirty-five pounds in the Metropolitan Police District, including the city of London; (b) Thirty pounds in Scotland; (c) Twenty-six pounds elsewhere. But the Act does not apply to the case where a house

is let at a rent including board, attendance or use of furniture.

In the case of a mortgage where there is other property besides the statutory dwelling house or dwelling houses included, the Act does not apply if the rateable value of such dwelling house or dwelling houses is less than one-tenth of the rateable value of the whole of the land comprised in the mortgage. The Act also does not apply to any securities but legal mortgages—not to equitable charges by deposit of title deeds. The mortgages must have had the property or legal estate conveyed to him by deed. Two other points should be noted. First that when the Act has once become applicable to any building or mortgage it continues to apply whether or not the dwelling house continues to be a dwelling house to which the Act applies. Secondly, where the standard rent is less than two-thirds of the rateable value the Act does not apply. The definition of "rateable value" is the rateable value on August 3, 1914, or, in the case of a house or part of a house first assessed after that date, the rateable value at which it was first assessed.

We turn now to the restrictions on recovering possession of property to which the Act applies, and to the restrictions on calling in mortgages. So long as the tenant pays the rent, and performs the other conditions of the tenancy, he can be deprived only for (a) committing waste; (b) committing a nuisance or annoyance to adjoining or neighboring occupiers; (c) if the premises are reasonably required by the landlord for the occupation of himself, or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be deemed satisfactory by the court asked to make the order. This class (c) has formed an important exception to the operation of the Act, but it is always a question of fact, and not of law—the question being raised and usually settled in the County Court without appeal to the High Court.

As to mortgages. So long as the standard interest is paid, and is not more than twenty-one days in arrear, and the covenants are observed, and the mortgagor keeps the property in a proper state of repair, and pays all interest and installments of principal recoverable under any previous incumbrance of the property, the mortgagee cannot call in his mortgage, or take any steps for exercising any right of foreclosure, or for otherwise enforcing his security, or for recovering the principal secured on the mortgage. But this does not apply where the principal is repayable by installments over not less than ten years from the date of the mortgage. A power of sale may be exercised moreover, if the mortgagee was in possession on November 25, 1915, and the mortgagor consents to the exercise of the powers in the mortgage. Lastly, if the mortgage is of a leasehold interest, and the mortgagee satisfies the County Court that his security, if seriously diminishing in value, or is otherwise in jeopardy, and that it is reasonable, therefore, that the mortgage should be called in and enforced, the County Court may authorize this to be done.

The statute has now been over two years in operation. In that period prices have enormously increased. Tradesmen's charges for repairs have gone up in some cases over 100 per cent, and yet the property owner cannot increase his rent in cases covered by the statutory limit. One result of this is that repairs are not being made by landlords. Then, while rents below the limit are stationary, those outwith it have gone soaring up, and tenants in that category are, as it were, making up for the low rental of the smaller tenants, and in the next place there is the curious spectacle of practically everybody but the landlord being allowed to raise charges to meet increased prices. On those who receive income from such property the effect is severe. It lowers their real income and at the same time renders the capital subject unsaleable. It has utterly prevented new ventures in build-

ing and thus caused a famine in housing accommodation for the working classes. As against these points, however, it has undoubtedly prevented a loud outcry against landlords and consequently acute discontent: in short, it has placated one section at the expense of another.

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MASTER AND SERVANT—ENTICEMENT.

248 Fed.

TRIANGLE FILM CORPORATION, Complainant-appellant, v. ARTCRAFT PICTURES CORPORATION, Defendant-appellee.

Second Circuit Court of Appeals.
Decided March 14, 1918.

It is not meddlesome for a third person to offer an employe better wages or other inducement to quit his employment, and does not render himself subject to an action for enticement or to an injunction by the employer.

Appeal from the District Court of the United States for the Southern District of New York.

Appeal from an order of the District Court for the Southern District of New York (Manton, J., presiding) denying the plaintiff's motion for an injunction *pendente lite*. The jurisdiction of the court depended upon diverse citizenship.

The plaintiff is a Virginia corporation engaged in manufacturing, distributing and exhibiting moving pictures, and on the 26th day of March, 1917, entered into a contract with one William S. Hart, of Los Angeles, California. By this contract the plaintiff engaged Hart as an actor to perform in motion picture productions "which are to be manufactured by the employer under the supervision of Thomas H. Ince." Hart accepted the employment "under the supervision of the said Thomas H. Ince." The contract recited that it was intended to be superseded by one in more elaborate form, and both parties acknowledged that Hart could not be replaced. It concluded as follows: "This contract is made upon the condition and with the understanding that the employe will be supervised in his acting and work hereunder by Thomas H. Ince."

On the day mentioned Ince was in the employ of the plaintiff as manufacturing producer at

its studio in Culver City, California, and held an interest in its stock, but on June 12, 1917, he sold out all this interest and severed his relations with it. Hart, upon learning these facts, terminated his relations with the plaintiff, and both Hart and Ince went into the employ of the defendant. It may be assumed that the defendant offered to take Hart in and indeed that it persuaded him to accept. It may also be assumed that the defendant knew of the contract between the plaintiff and Hart. Ince, however, violated no contract between himself and the plaintiff in selling out his stock interests in it or terminating his relations, nor is there undisputed evidence that, having done so, he attempted to dissuade Hart from continuing in the plaintiff's employ.

Learned Hand, D. J.—This case depends either on Lumley v. Gye (2 El. & Bl., 216) or upon a strangely misconceived extension of that doctrine. Lumley v. Gye (*supra*), a wholesome and widely accepted case, we not only accept on principle, but we should in any case be bound to treat it as law upon authority (Bitterman v. L. & N. R. R., 207 U. S. 196; Angle v. Chic., etc., R. R., 151 U. S., 1), and in that aspect the case stands upon the question whether Hart violated his contract. He so clearly did not that we hardly feel justified in any discussion of the question. He had in substance stipulated that his term should not last beyond Ince's connection with the plaintiff, and no one suggests that Ince had no right to sell out his interest and leave. Assuming, then, that the defendant did induce him to leave, it did not run counter to the doctrine of Lumley v. Gye (*supra*).

Realizing the danger of such a conclusion, the plaintiff then stands upon another leg, which is this: The reasonable expectation of an employer that his employes will continue with him is a part of his "good will," as we say, and any one who hurts him in that "good will" does him an "injuria," even though there be no contract broken and the employe might leave at pleasure. Lord Bowen put the doctrine as well as anybody in Mogul S. S. Co. v. McGregor (L. R., 23 Q. B., 598, 613), that intentional damage to one's property or trade without "just cause" is actionable. Moreover, the Supreme Court in Truax v. Raich (239 U. S. 33) and Hitchman Coal Co. v. Mitchell (December 10, 1917, 38 Sup. Ct. 65) has said that in such cases there may be a right of action, though the person persuaded does not break a contract in leaving.

Yet it is clear that the real question turns upon what is "just cause" (Privilege, Intent

and Malice, Oliver Wendell Holmes, Jr., 8 Harv. Law R. 1), and that in effect it makes slight difference whether one asks in respect of what "cause of action" the plaintiff suffered his damage, or whether the defendant had "just cause" for inflicting the damage, though it does make a good deal of difference in the department of the law. Nobody has ever thought, so far as we can find, that in the absence of some monopolistic purpose everyone has not the right to offer better terms to another's employe, so long as the latter is free to leave. The result of the contrary would be intolerable both to such employers as could use the employe more effectively and to such employes as might receive added pay. It would put an end to any kind of competition.

That such a doctrine should be supposed to follow from *Truax v. Raich* (*supra*) or *Hitchman Coal Co. v. Mitchell* (*supra*) somewhat surprises us. In the first case the defendant had threatened to use illegal means to induce the employer to discharge the plaintiff. In the second a labor union had determined to compel a mine to operate as a closed shop, and that too by fraud. It was held that since the union was not seeking to redress wrongs of which any of the plaintiff's employes complained, but intervened only for the purpose of preventing any open shops which might compete with closed shops elsewhere, they had no "just cause" for the ensuing damage. That purpose, i. e., to compel the whole industry to operate closed shops, was held to be illegal, and the illegality depended upon the supposedly meddlesome character of the intervention. That nobody in his own business may offer better terms to an employe, himself free to leave, is so extraordinary a doctrine that we do not feel called upon to consider it at large.

The order is affirmed.

NOTE.—*Enticing Servant Away From Employment.*—This note does not cover cases of master and apprentice, which have been recognized under our common law and legislation in regard thereto undoubtedly may rest on the police power of state, and is justified under its poor laws, if in no other way. The inquiry here is whether the willful enticement of a servant, knowing he is in the employment of another, to quit his service makes the enticer liable to damages to the master?

In *Angle v. Chicago St. P. M. & O. R. Co.*, 151 N. S. 1, 38 L. ed. 55, 14 Sup. Ct. 240, it appears that by interference on the part of others, laborers employed by plaintiff were caused to disperse and go elsewhere for work. The court said: "It has been repeatedly held that, if one maliciously interferes in a contract between two parties and induces one of them to break that contract to the

injury of the other, the party injured can maintain an action against the wrongdoer."

This case cites *Lumley v. Gye*, 2 El. & Bl. 216, where a singer had entered into a contract to sing only at the theatre of the plaintiff, and defendant maliciously induced her to break that contract. Defendant was held for damages sustained by plaintiff. Also it cites *Bowen v. Hall*, 6 Q. B. D. 333, 337, in which a third person was held for maliciously inducing a servant to break his contract for exclusive personal service to an employer, and defendant was held liable for the damages caused. So also the case cites *Walker v. Cronin*, 107 Mass. 555, where a third person willfully induced plaintiff's employes to leave their employment, and plaintiff losing their services lost also the profits expected to be derived therefrom. Plaintiff in that case had a right of action.

This principle as declared in *Haskins v. Royster*, 70 N. C. 601, was held in a later case by the same court to cover the malicious persuading by anyone of another to break his contract with employer. "It is not confined to contracts of service." *Jones v. Stanley*, 76 N. C. 355.

In *Employing Printers' Club v. Dr. Blosser Co.*, 122 Ga. 307, 50 S. E. 88, 69 L. R. A. 97, 106 Am. St. Rep. 134, all of the cases in English reports are cited and the Angle and Walker cases, *supra*, and there it was said that: "Though this rule is not universal in the courts of last resort of our sister states, it is believed to have been followed in most of them."

An action has been held maintainable even by agents of a principal, where a third person knowingly induced the latter to break his contract. *Raymond v. Yarrington*, 96 Tex. 443, 72 S. W. 580, 97 A. S. R. 914. In the opinion the Lumley, Angle, Walker and Jones cases, *supra*, were all cited.

In *Betterman v. L. & N. R. Co.*, 207 U. S. 196, 28 Sup. Ct. 91, the Angle case is referred to as sustaining the principle of maliciousness in interfering in any contract. Presumptively, the court also approves of the Lumley case, a contract of employment.

In *Truax v. Raich*, 239 U. S. 33, it was ruled that there is the right to earn a livelihood and that an employment is at will does not make it one at the will of others and the unjustified interference of third persons, with contract right therein, is actionable.

In *Hitchman Coal & I. Co. v. Mitchell*, 38 Sup. Ct. 65, Justice Whitney, speaking for a majority of the court, in the prevailing opinion, citing the Angle and Walker cases, among others, declares that: "The right of action for persuading an employe to leave his employer is universally recognized and it rests upon fundamental principles of general application." Then he considers matters set up by way of justification for the interference with employment. First he discards question of right of employees and then speaks of the right of workingmen to form unions and to enlarge their membership, saying this right is freely accorded provided the objects of the union are proper and legitimate, but even this right in such a case is not absolute, but must be in reasonable regard for conflicting rights. Where as in the instant case defendants were notified that the mine in question was run "non-union," and contracts with employes, voluntarily made, were valuable, they had no right

to interfere. It is hard to differentiate that case in general principle from the instant case, and we make bold to say that the doctrine does exist, that if an employer has a valuable contract in the service of an employe, it may not be interfered with by another in seeking his own advantage and his interference need not be malicious so as to make his interference actionable. All that is necessary is for the third person to know of the contract of employment. The particular features that were in the Hitchman case need not exist. The mention of them was merely incidental.

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1918—WHEN AND WHERE TO BE HELD.

American—Cleveland, Ohio, Hotels Winton and Statler; August 28, 29 and 30.
 Alabama—Montgomery, July 12 and 13.
 Arkansas—Little Rock, May 30 and 31.
 California—San Jose, June 6, 7 and 8.
 Colorado—Colorado Springs, July 12 and 13.
 Georgia—Tybee Island, May 31, June 1 and 2.
 Hawaii—Honolulu, May 29.
 Illinois—Chicago, Hotel LaSalle, May 31 and June 1.
 Indiana—Indianapolis, July 10.
 Iowa—Des Moines, June 27 and 28.
 Kentucky—Danville, July 2 and 3.
 Maryland—Atlantic City, N. J., Hotel Chelsea, June 27, 28 and 29.
 Michigan—Kalamazoo, June 28 and 29.
 New Hampshire—Crawford House, White Mountains, July 6.
 New Jersey—Atlantic City, June 14 and 15.
 North Carolina—Wrightsville Beach, June 25, 26 and 27.
 Ohio—Cleveland, August 26 and 27.
 Oregon—Portland, November 19 and 20.
 Pennsylvania—Bedford Springs, June 25, 26 and 27.
 South Carolina—Spartanburg, about August 1.
 South Dakota—Sioux Falls, June 19 and 20.
 Tennessee—Chattanooga, August 7, 8 and 9.
 Texas—Wichita Falls, July 3, 4 and 5.
 West Virginia—Elkins, July 16 and 17.
 Wisconsin—Racine, June 26, 27 and 28.

MEETING OF THE LOUISIANA BAR ASSOCIATION.

The Louisiana Bar Association convened at the Gruenewald Hotel, New Orleans, April 19, 1918. Only eighty members attended, war conditions being given as an excuse for the small attendance.

The president, George H. Terriberry, of New Orleans, urged many reforms in his address. He especially emphasized the need of spurring up the courts on the proper use of their inherent power to purge the profession of undesirable members. He said:

"The Supreme Court recently held, even though a lawyer stood convicted of a crime, it had no jurisdiction to disbar unless the act was committed in the capacity of attorney. It gave a very narrow interpretation to the article of the Constitution conferring jurisdiction over acts of professional misconduct. The almost universal rule is that courts which have the power to admit to practice have inherently the power to disbar, but our court took the view it had no jurisdiction in such matters as the provision of the Constitution was confined to acts of professional misconduct. It is unfortunate we find lawyers in the penitentiary who are members of our bar and consequently officers of our courts. A law should be passed providing an attorney should be dropped from the rolls upon being convicted of any offense involving moral turpitude."

Mr. W. O. Hart, of New Orleans, succeeded in securing the indorsement of all but two of the recommendations of the Conference of Commissioners on Uniform State Laws. The convention approved the following acts and resolutions, suggested by the conference: A uniform pure food law; domestic acknowledgement form marriage and marriage license law; uniform act; uniform flag law; establishment of a department of uniformity of legislation in the state library; appointment of special committees in each house of the Legislature on uniformity of legislation; uniform cold storage law; uniform vital statistics law; the establishment of a legislative drafting bureau; uniform health insurance law; opposing any reduction in the age limit specified in the child labor law, and a uniform divorce law. The association voted down a resolution approving the adoption by the Legislature of the uniform Torrens system of land registration. It also voted down the suggestion of adoption of a uniform state law on the extradition of persons of unsound mind.

A bitter controversy arose over a resolution instructing the Grievance Committee to report publicly its findings on charges of oppression in office brought against Hon. Fred D. King, a local district judge.

Much testimony was taken in the case and a review of the evidence together with the findings of the committee were reported to the Executive Committee. The president sustained a point of order that under the constitution of the Association the report could not be made

public and that any action to be taken must be on the recommendation of the committee. The committee made no recommendation. On appeal the president was sustained, but the local press has criticised the action of the association, contending that the absence of any will be justified in believing the charges to be true.

The officers elected for the ensuing year were as follows: President, Charles A. McCoy, Lake Charles; Vice-Presidents, Walter L. Gleason, New Orleans; George D. Hudson, Monroe; Hon. Albin Provosty, New Roads; Col. Isaac D. Wall, Baton Rouge; Secretary-Treasurer, Wynne G. Rogers, New Orleans.

BOOK REVIEW

WHITLEY ON BILLS, NOTES AND CHECKS.

Mr. James L. Whitley of the New York Bar, former assistant corporation counsel of the City of Rochester and member of Committee on Banks, in New York, presents under the above title, the completely annotated text of Negotiable Instruments Law, as adopted by forty-five states, the District of Columbia and Hawaii.

The plan followed in this work is to take the New York statutes as its sections have been numbered, and where construction appears in any other jurisdiction, the section considered is shown by a table identifying the corresponding section.

Decisions upon this law, since it started on its career to become a uniform law in the states, have been in overwhelming mass and therefore, to make it practically usable, only the very important cases are cited or referred to.

The work gives forms of paper with indorsements thereon and discusses their practical effect in negotiation and the liability of parties thereto. The rights of bona fide holders for value in bills or checks carrying or not carrying notice of irregularities are given.

This book is a very useful guide in everyday business transactions and is of ready reference and quick use. Its adaptability to this purpose is reinforced by the full and careful index to its sections and its citation of cases is from all of the states which have adopted the uniform Negotiable Instrument Law.

The book is bound in law buckram, is attractive in appearance, 400 pages in bulk, and is published by National Law Book Company, Rochester, N. Y. 1917.

HUMOR OF THE LAW.

Joy Rider (stopped by rural constable): Haven't we got any rights left in this country? Doesn't the constitution guarantee us life, liberty and the pursuit of happiness?

Constable: It don't guarantee no man the pursuit of happiness at ninety miles an hour.

A Western legislator once introduced a measure to prohibit window cleaners from stepping out on window sills above a certain height. When another prominent member of the legislature championed the odd bill, a friend asked him:

"Why the deuce did you support that measure?"

"Well," said the diplomatic member, "it wasn't that I care a cuss for the window cleaners in the state, but those fellows are apt to fall on pedestrians, and there are some good ones among us."

"Your honor," in silvery tones, said the forewoman of the jury, "we forgot to ask which gentleman is the plaintiff and which the defendant. But, after all, I do not suppose it makes any particular difference, for we find them both guilty. All the jury ladies are agreed that men who wear such atrocious whiskers are perfectly capable of anything."

An attorney having addressed the court as "gentlemen," instead of "your honors," after he had concluded, a brother of the bar reminded him of his error. He immediately rose and apologized thus:

"May it please the court, in the heat of debate I called yer honors gentlemen. I made a mistake, yer honors, and humbly apologize."

Col. Sam Will John, of Alabama, says:

"Legislation is not an easy task. You cannot, to save your life, on any subject, use language that will be construed by everybody the same way. I will give you an illustration that everybody will recognize—you will see how wide apart they have gone in the construction of one single statement. If you read Timothy you will see that it says, 'The bishop shall be the husband of one wife.' How has that been construed? The most of the civilized world say you shall not have two, three or more wives, and we know how the American construes it, but some construe it that he shall have at least one wife and as many more as he can take care of."

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
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1. Adverse Possession—Intent to Claim.—One in the occupancy of a tract of land with the intent to claim and hold it to the extent of the boundaries of the instrument under which he holds is in "actual possession" of all to the extent that it is not actually held by some other person.—*Russell v. McIntosh*, Ky., 201 S. W. 33.

2. Assault and Battery—Justification.—Consent to assault being no justification, contributory negligence is no defense to action for injuries to hunter, whose companion mistook him for animal and shot him.—*White v. Levarn*, Vt., 102. Atl. 1035.

3. Associations—Ratification.—Where president of unincorporated irrigation association, empowered with management, subject to directors, notified them he had employed plaintiffs as attorneys in suit against association, and no director objected, contract was ratified and binding.—*Ft. Morgan Reservoir & Irrigation Co. v. Sterling Irr. Co.*, Colo., 171 Pac. 72.

4. Bankruptcy—Composition.—Permission to bankrupt to withdraw offer of composition after acceptance by majority in number and amount of creditors and application to confirm together with objections should, under Bankruptcy Act, §§ 12, 13, be denied; act authorizing no such procedure.—*In re Agree*, U. S. D. C., 247 Fed. 590.

5.—Conditional Sale.—Where "Holmes notes," evidencing conditional sale, were not re-

corded until ten days prior to bankruptcy purchaser, they were valid as against his trustees in bankruptcy under Bankr. Act U. S. § 11 as amended in 1910, as to rights of trustee in bankruptcy.—*Delaval Separator Co. v. Johnson*, Me., 102 Atl. 968.

6.—Insolvency.—Creditor's mere suspicion that debtor who makes payment or gives security is insolvent does not, where transaction occurs within four months of bankruptcy, render it preferential, but it is necessary that creditor have reasonably founded belief of debtor's insolvency.—*Donohue v. Dykstra*, U. S. D. C., Fed. 593.

7.—Jurisdiction.—Under Bankruptcy Act, as amended by Act June 25, 1910, § 2, a bankruptcy court of ancillary jurisdiction, which has taken possession of mortgaged property, is without authority, regardless of the court of primary jurisdiction, to release such property to mortgagee for the purpose of an independent foreclosure suit.—*In re Paterson Lumber Co.*, U. S. D. C., 247 Fed. 578.

8.—Liens.—Bankruptcy Act, § 64a, dealing with taxes legally due shall be paid in advance of dividends to creditors, has reference to payment out of the general funds of the estate, is not intended to disturb priority of liens by substantive law.—*Polk County, Iowa Burns*, U. S. C. C. A., 247 Fed. 399.

9.—Participation by Claimants.—Creditors whose claims were withdrawn and expunged from list of claims held not to have participated in distribution of estate, and hence they may, despite Bankruptcy Act, § 70a, subd. 5, thereafter, subject to judgments recovered on their claims proceed of life policies payable to estate of bankrupt, surrender value of which had been paid trustee.—*Andrews v. John Nix & Co.*, S. C., 38 S. Ct. 249.

10.—Process.—Omission in printed copy of order for publication of subpoena in involuntary petition against partnership and members thereof, who resided without district, held no ground for setting aside adjudication; omission notwithstanding order unintelligible.—*Hunter, Walcott Co. v. J. G. Cherry Co.*, U. S. C. C. A., 247 Fed. 458.

11.—Withholding from Record.—Under Bankruptcy Act, § 70e, mortgage given in understanding that it would be withheld from record held subject to be set aside at suit of trustee, and four months' limitation had no application.—*Cooper Grocery Co. v. Penland*, U. S. C. C. A., 247 Fed. 480.

12. Banks and Banking—Receiving Deposits.—To warrant conviction under Rev. St. 1904, § 4585, making it an offense for owner, agent or manager of a private bank to receive a deposit knowing owner of bank to be insolvent, it is necessary that accused should have had ultimate authority in managing the bank, if he was in fact intrusted with the duty of receiving deposits, since he was then the agent of the owner.—*State v. Munroe*, Mo., 201 S. W. 100.

13. Bills and Notes—False Representations.—Where defendant contended that note was lawfully obtained by false representations as to value of corporate stock, evidence that corporate officer made false representations to others in attempting to induce plaintiff to make loan was admissible.

ing to dispose of stock was admissible.—First Nat. Bank v. Garner, Ind., 118 N. E. 813.

14.—**Negotiability.**—Notes conditioned that if paid at maturity 6 per cent should be deducted from amount, and that non-payment of installment for more than 30 days after maturity should make remaining installments due at holder's option, were not negotiable instruments within Comp. Laws 1909, §§ 4626, 4627.—Lambert v. Harrison, Okla., 171 Pac. 45.

15.—**Notice of Dishonor.**—Under Negotiable Instruments Act (Code Pub. Civ. Laws, art. 13, § 128), waiver of notice of dishonor may be implied by any conduct or words of indorser by which holder of note is reasonably induced to believe that such waiver was intended.—Linthicum v. Bagby, Md., 102 Atl. 997.

16.—**Presumption.**—Possession by third party of note payable to payee's order and not indorsed by him raises no presumption of ownership, and no such presumption is created by Negotiable Instrument Law, § 49.—Allen v. Hays, Tenn., 201 S. W. 135.

17. **Brokers—Performance.**—When a broker has brought the parties together, and they have entered into a valid agreement, he has performed his full duty, and is entitled to his commission, and is not responsible for non-performance of the contract by either party thereafter.—Hudson P. Rose Co. v. Goodale, Perry & Dwight, N. Y., 169 N. Y. S. 446.

18.—**Single Agency.**—A real estate broker, after finding a prospective purchaser of property intrusted to him for sale at a given price, cannot, without disclosing offer to principal, purchase at reduced price and sell to purchaser at an enhanced price and retain the profit.—McBride v. Campredon, N. M., 171 Pac. 140.

19. **Carriers of Goods—Discrimination.**—As the prompt movement of cars is necessary to carry on business of carriers, as well as to prevent discrimination among shippers, carrier may impose demurrage charges on privately owned tank cars used in its business.—Pittsburgh, C. & St. L. Ry. Co. v. Freedom Oil Works, U. S. D. C., 247 Fed. 573.

20.—**Estoppel.**—A connecting carrier is not estopped to rely on a provision in a bill of lading, limiting liability to loss occurring on its own lines to defeat recovery on an unlawful contract made by its agent to pay such loss on interstate shipment, since estoppel cannot be invoked to obtain for shipper an illegal preference.—Southern Ry. Co. v. Lewis & Adcock Co., Tenn., 201 S. W. 131.

21. **Carriers of Live Stock—Delay.**—Where railroad company, knowing that margin of safety was small, elected to transport shipment of live stock without unloading for food, etc., and unloading of two of cars was delayed, because consignee's terminal facilities would only accommodate limited number of cars, and engine departed after placing on siding all cars it would hold, held, that company must, as to such cars delayed, be deemed to have violated Twenty-Eight Hour Law.—United States v. Philadelphia & R. Ry. Co., U. S. C. C. A., 247 Fed. 469.

22.—**Twenty-Eight Hour Law.**—Where railroad company, knowing delays were imminent and margin of safety small, attempted to trans-

port shipments of cattle without unloading for feeding, water, and rest, held that, where animals were confined beyond period allowed by Twenty-Eight Hour Law, company must be deemed to have knowingly and willfully violated act.—Philadelphia & R. Ry. Co. v. United States, U. S. C. C. A., 247 Fed. 466.

22. **Carriers of Passengers—Defective Appliances.**—Where a door on a street car worked so hard that passenger, directed to push, fell to highway when door suddenly opened, the street railroad company was liable; the door being defective.—Adams v. Portland Ry., Light & Power Co., Ore., 171 Pac. 219.

24.—**Defective Appliances.**—Passenger, suing street railway for injuries, was entitled to judgment on evidence that, when another passenger was about to sit down on seat in front of plaintiff, such seat fell from supports and struck plaintiff's foot.—Rosenbaum v. Union Ry. Co., N. Y., 169 N. Y. S. 456.

25. **Chattel Mortgages—Bona Fide Purchaser.**—Where horse dealer sold horse and took notes and mortgage, having it recorded in town in which the purchaser falsely said he resided, record of mortgage was invalid as against bona fide purchaser in such town, and dealer could not retake horse under Rev. St. c. 96, § 1, as to recording chattel mortgages.—Martin v. Green, Me., 102 Atl. 977.

26.—**Description of Property.**—Under mortgage on buildings, machinery, plant, tools, equipment, and franchises of glass manufacturing company, held, that machines and hand molds used in manufacturing glass articles, whether fast or loose, passed under mortgage.—In re East Stroudsburg Glass Co., U. S. D. C., 247 Fed. 614.

27. **Commerce—Burden on—Tax Law Va. § 45.**—As amended by Acts 1915 (Ex. Sess.) c. 148, imposing license taxes on manufacturers who sell their products at place other than that of manufacture, is not invalid, as direct burden on interstate commerce in its application to non-resident manufacturers.—Armour & Co. v. Commonwealth of Virginia, U. S. S. C., 38 S. Ct. 267.

28.—**Burden on—Order of Railroad Commission requiring railroad to stop two interstate trains at a county seat having a population of 1,500, pursuant to Vernon's Sayles' Ann. Civ. St. 1914, art. 6676, subd. 2, held not to impose an unreasonable burden on interstate commerce.—Gulf, C. & S. F. Ry. Co. v. State of Texas, U. S. S. C., 38 S. Ct. 286.**

29.—**Excise Taxes.**—St. Mass. 1909, c. 490, pt. 3, § 56, together with St. Mass. 1914, c. 724, § 1, imposing excise taxes measured according to capital stock on foreign corporations doing intrastate and interstate business in Massachusetts, is invalid as direct burden on Interstate commerce.—International Paper Co. v. Commonwealth of Massachusetts, U. S. S. C., 38 S. Ct. 292.

30.—**Interstate Transaction.**—Where an engine had been specifically designated for a certain interstate train, and a hostler was told to fire and prepare the engine for such train, and while doing so was injured, he was engaged in interstate commerce within the federal Employers' Liability Act.—Cincinnati, N. O. & T. P. Ry. Co. v. Morgan, Tenn., 201 S. W. 123.

31.—**Interstate Transaction.**—Foreign holding corporation, whose local activities were confined to holding stockholders' and directors' meetings, keeping records, distributing dividends, etc., was not engaged in interstate commerce.—*Cheney Bros. Co. v. Commonwealth of Massachusetts*, U. S. S. C., 38 S. Ct. 295.

32.—**Interstate Transaction.**—Shipments over defendant's road wholly within state held not necessarily interstate commerce, depending on common control, management or arrangement for continuous shipment notwithstanding notations in bill of lading and delivery to connecting line, which carried lumber out of the state and paid first carrier.—*Service v. Sumpter Valley Ry. Co.*, 171 Pac. 202.

33. **Conspiracy—Bribery.**—Criminal Code, § 19, punishing conspiracies to oppress free exercise of rights secured by federal Constitution or laws, etc., is inapplicable to conspiracy to bribe voters at election for presidential electors and members of Congress.—*United States v. Bathgate*, U. S. S. C., 38 S. Ct. 269.

34. **Constitutional Law—De Facto Government.**—The recognition of the Carranza government by the political department of our government as the de facto and later as the de jure government of Mexico binds the judges, as well as all other officers and citizens of the government.—*Riccaud v. American Metal Co.*, U. S. S. C., 38 S. Ct. 312.

35.—**License.**—Where evidence did not show, and there was nothing in Acts 35th Leg., c. 190 and chapter 207 as amended by First Called Sess. 35th Leg., c. 31, providing for licensing motor vehicles, to show that licenses were excessive, it must be presumed they were reasonable.—*Atkins v. State Highway Department*, Tex., 201 S. W. 226.

36.—**Political Department.**—The conduct of foreign relations is committed to the executive and legislative departments, and the propriety of their exercise of this political power is not subject to judicial inquiry or decision.—*Oetjen v. Central Leather Co.*, U. S. S. C., 38 S. Ct. 309.

37.—**Referendum.**—City ordinance appropriating water supply and providing for assessment of compensation and issuance of bonds held not repealed by Const. Ohio 1912, which in article 18, § 5, authorizes referendum on such ordinances, where it took effect before the Constitution became operative.—*Sears v. City of Akron*, U. S. S. C., 38 S. Ct. 245.

38. **Contracts—Modification.**—Where there was ample consideration to sustain original contract and contract authorized it, modification by parties for purpose of facilitating work under contract is not subject to attack on ground that it was unsupported by consideration; original consideration extending to modification.—*Harrison v. City of Tampa*, U. S. D. C., 247 Fed. 569.

39.—**Mutuality.**—An agreement of a saloon keeper to run only a saloon on certain premises and use the beer of a brewer exclusively for ten years at the ruling market price is mutual and binding, although the brewer does not agree to furnish whatever goods may be required.—*Ziehm v. Frank Stell Brewing Co. of Baltimore City*, Md., 102 Atl. 1005.

40. **Corporations—Assignment of Stock.**—Where director at request of one acting for corporation assigned his stock certificate in blank, but no transfer was entered on corporate books, and it was not contemplated either by director or company that he had lost his status as stockholder so as to be ineligible, such director was still eligible to act in that capacity.—*Lippman v. Kehoe Stenograph Co.*, Del., 102 Atl. 988.

41.—**Foreign Corporations.**—Foreign tobacco corporation which sold its business within a state pursuant to a trust dissolution decree held not to be doing business therein so as to subject it to service of process although it owned stock in local subsidiary companies and advertised and sent soliciting agents within state.—*Peoples' Tobacco Co. v. American Tobacco Co.*, U. S. S. C., 38 S. Ct. 283.

42.—**Sale of Stock.**—Under Rev. St. 1908, § 870, sale of stock of another company made by corporation after expiration of its charter without delivery or assignment of certificate, which was lost, and refusal to issue new certificate because buyer did not furnish indemnifying bond and because seller was not record owner of stock, did not effect sale as against attaching creditor.—*Lucifer Coal Co. v. Buster*, Colo., 171 Pac. 61.

43.—**Stockholder Liability.**—Creditors' bill to enforce stockholders' liability on behalf of plaintiff and all others joining in the bill held not maintainable without the corporation as a party.—*Clinton Mining & Mineral Co. v. Cochran*, U. S. C. C. A., 247 Fed. 449.

44. **Damages—Mental Suffering.**—That one became angry because of his light service being cut off for non-payment, which service was renewed immediately upon payment and request, does not entitle him to recover for mental suffering alone, there being no personal injury, damage to property, or other loss sustained.—*Texas Power & Light Co. v. Taylor*, Tex., 201 S. W. 205.

45. **Deeds—Restrictions.**—Restriction in deed that but single dwelling house should be erected on lot, with covenant to insert similar restrictions in other conveyances in district referred to single house or structure, and was not violated by grantor's subsequent conveyances permitting erection of duplex dwelling or apartment house.—*Rohrer v. Trafford Real Estate Co.*, Pa., 102 Atl. 1050.

46. **Dower—Presumption.**—Where widow and her present husband were in possession of house when judgment was rendered giving widow her dower, it must be presumed that possession was in exercise of dower right, in view of Ky. St. § 2138.—*Johnson v. Boggess*, Ky., 201 S. W. 42.

47. **Easements—Right of Way.**—Agreement by defendant's grantors that so long as they owned servient estate, way should remain open, which agreement was not signed by plaintiff's grantor, did not limit existence of right of way to period during which defendant's grantor's owned servient estate, and plaintiff, having acquired dominant tenement, may, way being prescriptive one, assert his easement.—*Novinger v. Shoop*, Mo., 201 S. W. 64.

48. **Electricity—Discontinuing Service.**—The act of a lighting company in discontinuing service without notice upon user's default for past month's service, held proper, where contract provided for discontinuance on default, and it was immaterial that the amount due was not in excess of deposit by user to secure performance.—*Texas Power & Light Co. v. Taylor*, Tex., 201 S. W. 205.

49. **Eminent Domain—Taking Property.**—A contractor with the United States is bound to perform the contract in accordance with the laws of the land, and without disregarding the rights or appropriating the property of others, and is vested with no power to take the property of others.—*William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co.*, U. S. S. C., 38 S. Ct. 271.

50.—**Taking Private Property.**—Gen. Code Ohio, §§ 3677-3697, authorizing municipalities to determine necessity for taking private property without giving owner a hearing, held valid.—*Sears v. City of Akron*, U. S. S. C., 38 S. Ct. 245.

51. **False Pretenses—Reliance on.**—If defendant made pretenses without intent that they should be relied on, but subsequently sold stock with intent that buyer should be influenced by the former false pretenses, he, by adoption, renewed such pretenses.—*Clark v. People*, Colo., 171 Pac. 69.

52. **Forcible Entry and Detainer—Constitutional Law.**—Rem. & Bal. Code Wash. §§ 811 and 825, making possession for five days preceding unlawful entry sufficient basis for forcible entry and detainer action, etc., does not unconstitutionally conflict with U. S. Rev. St. § 2289 et seq. (Comp. St. 1918, § 4530 et seq.) relating to homestead entries.—*Denee v. Ridpath*, U. S. S. C., 38 S. Ct. 226.

53. **Fraudulent Conveyances—Bill of Sale.**—An unrecorded bill of sale of undelivered personality executed by a deceased is not void as to

an order of court setting aside a monthly allowance to wife of deceased, and the wife not being a "creditor" within Rev. Laws, § 1078 (Comp. Laws, § 2703).—*Guisi v. Guisti*, Nev., 171 Pac. 161.

54.—**Fraud.**—Though, under Rev. St. Tex. 1911, art. 6824, failure to record mortgage would not affect its validity, mortgage given with understanding that it would not be recorded might be set aside as in fraud of creditors.—*Cooper Grocery Co. v. Penland*, U. S. C. C. A., 247 Fed. 480.

55.—**Insolvency.**—Insolvent debtor's transfer of property alleged to be in fraud of creditors will not be set aside merely because transferee is a creditor and indebtedness was consideration for transfer, as under Rev. Civ. Code, art. 1978, one of the elements in revocatory action is an injury to creditors.—*Lowenberg, Marks & Co. v. H. & C. Newman, Limited*, La., 77 So. 891.

56. **Gaming—Gambling Device.**—Slot machine which gives five cents worth of gum for each nickel dropped therein, but also gives trade checks when indicated, is "device of chance" within Rev. St. 1916, c. 130, § 18, although amount of checks to be received is indicated before each play.—*State v. Googin*, Me., 102 Atl. 970.

57. **Guaranty—Corporation.**—A contract by one corporation "to guarantee the principal and interest on the bonds" of another corporation held a guaranty of payment and not of collection.—*Graysonia-Nashville Lumber Co. v. Goldmann*, U. S. C. C. A., 247 Fed. 423.

58. **Husband and Wife—Alienation of Affections.**—A mother-in-law is not guilty of alienating her infant son's affections for his wife merely because she disliked the wife and regretted the marriage and said that the son because of extreme youth was not fitted for the responsibilities of a married man.—*Cooper v. Cooper*, Kan., 171 Pac. 5.

59.—**Antenuptial Contract.**—Under Rev. Civ. Code La. art 2396, husband is not liable to his wife for interest on her property, either dotal or paraphernal, delivered into his custody under antenuptial contract, which did not make him agent for wife, until after demand for return.—*Murphy v. McLoughlin*, U. S. C. C. A., 247 Fed. 385.

60.—**Inheritance.**—Where the wife at marriage was seized of an estate of inheritance in land, the husband, at common law, became seized of the freehold jure uxoris, and took the rents and profits during their joint lives on the theory of the unity of husband and wife.—*Otto F. Stifel's Union Brewing Co. v. Saxy*, Mo., 201 S. W. 67.

61. **Injunction—Equity.**—Mere publication by trade union of existence of a strike and of its causes in a thorough manner is no ground for equitable interference on suit of employer.—*Truax v. Bisbee Local*, No. 380, Cooks' and Waiters' Union, Ariz., 171 Pac. 121.

62.—**Prejudice.**—Mere possibility of future litigation resulting from dismissal of suit, in which plaintiff's motion for preliminary injunction, made on bill and affidavits, was denied, does not amount to prejudice to defendant, precluding court from dismissing suit on plaintiff's motion.—*Orr v. Coca-Cola Co.*, U. S. C. C. A., 247 Fed. 452.

63. **Insane Persons—Tender.**—In action by committee of insane person to avoid purchase at auction of large number of bulky articles from storage company, committee was relieved from making a formal tender back by company's refusal to accept offer to return.—*McCarthy v. Bowling Green Storage & Van Co.*, N. Y., 169 N. Y. S. 463.

64. **Insurance—Indemnity Policy.**—Under liability policy limiting liability to \$5,000, and providing for defense at insurer's expense, insurer held liable for taxable costs in addition to the \$5,000.—*Casey-Hedges Co. v. Southwestern Surety Co.*, Tenn., 201 S. W. 137.

65.—**Insurable Interest.**—One has no insurable interest in life of his second cousin who was not indebted to him, and who furnished him with no support.—*Cotton v. Mutual Aid Union*, Ark., 201 S. W. 124.

66. **International Law—De Facto Government.**—Recognition of Carranza government held to validate all its actions from the commencement of its existence, and hence seizure and sale of bullion in 1913 by military commander representing that government must be treated as the act of a duly commissioned general of the legitimate government of Mexico.—*Ricaud v. American Metal Co.*, U. S. S. C., 38 S. Ct. 312.

67.—**Recognition.**—Recognition of government originating in revolution as de jure government held retroactive and to validate all actions and conduct of such government from commencement of its existence.—*Oetjen v. Central Leather Co.*, U. S. S. C., 38 S. Ct. 309.

68. **Intoxicating Liquors—License.**—In prosecution for selling whiskey in violation of prohibition amendment, evidence that defendant had been granted license by United States to retail intoxicating liquor was admissible.—*Birch v. State*, Ariz., 171 Pac. 135.

69. **Libel and Slander—Posting as Libelous.**—Posting of letter denouncing another as an assassin of character, a liar, and unworthy of respect and esteem of decent and fair-minded people, is libelous.—*Smith v. Lyons*, La., 77 So. 896.

70. **Licenses—Monopoly.**—Contract between partnership engaged in running auto busses, etc., in city of Jacksonville, and United States military encampment near city giving a monopoly of conveying officers and soldiers at reduced fare, etc., held not the grant of such a "franchise" by the government of the United States as would exempt it from payment of license tax imposed by state, county, or municipality.—*Ex parte Marshall*, Fla., 77 So. 869.

71.—**Uniform Taxation.**—License fees for operation of motor may be fixed according to horse-power, though Const. art. 8, §§ 1, 2, requires uniformity of taxation and forbids assessment of property for taxes elsewhere than in county where it is situated.—*Atkins v. State Highway Department*, Tex., 201 S. W. 226.

72. **Literary Property—Unfair Competition.**—Relative to right to injunction for unfair competition, defendant's title of play, "The House of a Thousand Scandals," held not to so resemble plaintiff's "The House of a Thousand Candies," as to be calculated to deceive.—*Selig Polyscope Co. v. Mutual Film Corp.*, N. Y., 169 N. Y. S. 369.

73. **Mandamus—Review.**—Where, on conflicting motions for revivor in case in which one of original parties had died, court, after full hearing in regular course, granted one and denied the other, there was an exercise of jurisdiction, and the defeated applicant is not entitled to mandamus to review the same.—*Ex parte Slater*, U. S. S. C., 38 S. Ct. 265.

74. **Master and Servant—Contributory Negligence.**—Servant, working near open elevator shaft guarded only by channel iron 36 inches from floor, who went on his hands and knees into cylindrical iron tank to smooth its edges, and in process rolled it into shaft, was contributorily negligent.—*Moose v. Galigher Machinery Co.*, Utah, 171 Pac. 153.

75.—**Course of Employment.**—Where a motion picture company plant occupied four corners of a street intersection and an employee, loitering in the street, was run over by a director's automobile, the accident was not one arising out of the employment within the Workmen's Compensation Act.—*Balboa Amusement Producing Co. v. Industrial Accident Commission*, Cal., 171 Pac. 108.

76.—**Discharge of Employe.**—Where no contract existed requiring members of defendant union in plaintiff's service to continue work, defendant union violated no right of plaintiffs' by causing such members to quit their employment.—*Truax v. Bisbee Local*, No. 380, Cooks' and Waiters' Union, Ariz., 171 Pac. 121.

77.—**Federal Employers' Liability Act.**—Railway company is not liable under federal Employers' Liability Act to its civil engineer, who slipped when decayed spot on tie gave way and allowed his foot to fall in space between ties when ballasting was low, neither defect in tie

nor in ballasting which was not according to rule rendering track unfit for use.—*Nelson v. Southern Ry. Co.*, U. S. S. C., 38 S. Ct. 233.

78.—**Hazardous Employment.**—Under Workmen's Compensation Act, § 3, subds. 3, 4, employee in coal and wood yard, which then was not classed as hazardous employment, is not, where injured splitting wood, entitled to compensation on theory that it was in connection with operation of vehicle, because wood would ultimately be hauled by him in vehicle.—*Casterline v. Gillen*, N. Y., 169 N. Y. S. 345.

79.—**Inspection.**—Boiler Inspection Act, § 2, held not to prevent liability for injury or death caused by feature of construction which is unsafe, though not disapproved by the federal boiler inspector.—*Great Northern Ry. Co. v. Donaldson*, U. S. S. C., 38 S. Ct. 230.

80.—**Invitee.**—An invitee in a store is not to be too circumscribed as to his movements while waiting for a clerk to exhibit goods, but he has a right to inspect goods and frequent places used by other patrons of the store, and provided for their use by the storekeeper.—*S. H. Kress & Co. v. Markline*, Miss., 77 So. 858.

81.—**Partial Loss.**—Under Workmen's Compensation Law, § 15, subd. 3, injury to thumb requiring amputation of distal phalanx, and removal of slight chip of bone of proximal phalanx, held not equivalent to loss of whole thumb.—*Baron v. National Metal Spinning & Stamping Co.*, N. Y., 169 N. Y. S. 337.

82. **Monopolies**—Board of Trade.—Rule of Board of Trade prohibiting purchase of grain "to arrive" between sessions, except at closing, bid held valid under the Anti-Trust Act in view of its limited operation and its improvement of market conditions.—*Board of Trade of City of Chicago v. United States*, U. S. S. C., 38 S. Ct. 242.

83. **Mortgages**—Consideration.—Though mortgagor was not a party to a note secured by mortgage under seal reciting that it was given as collateral security the objection that it was without consideration was without merit, where no failure or illegality of consideration was alleged as the mortgage imported consideration.—*Herron v. Stevenson*, Pa., 102 Atl. 1049.

84.—**Estoppel.**—Irregularities in an executory process will not cause title thereunder to be annulled at suit of creditors of seized debtor where he has acquiesced in proceedings and has given possession to purchaser, particularly where no fraud is alleged and proved.—*Lowenberg, Marks & Co. v. H. & C. Newman, Limited*, La., 77 So. 891.

85. **Municipal Corporations**—Due Care.—Bicycle rider, entering street from private driveway, held required to watch the traffic in the street, and where, without warning from bell, she ran directly into the path of an automobile, she did not exercise due care.—*Hunter v. Mountfort*, Me., 102 Atl. 975.

86.—**Imputable Negligence.**—Where plaintiff, a nurse in a public institution, who had been furnished by her employer with car, hired with its driver to carry crippled children home, was injured by a collision, negligence of driver is not imputable to her.—*Van Ingen v. Jewish Hospital of Brooklyn*, N. Y., 169 N. Y. S. 412.

87.—**Public Use.**—Though a privately owned terminal delivery railroad served only one factory, its use of the street was a public use, where it connected with all trunk lines, and issued their bills of lading; the goods being immediately put in transit.—*Stanley v. Jay St. Connecting R. R.*, N. Y., 169 N. Y. S. 530.

88.—**Street Assessments.**—Under Portland City Charter, § 400, all manner of errors and irregularities in ordinances for assessment of street improvements may be corrected whether "jurisdictional or otherwise," and a reassessment made for pavement already laid, providing freeholder has some opportunity to be heard before his property is taken.—*Wilson v. City of Portland*, Ore., 171 Pac. 201.

89.—**Street Obstructions.**—"Bulk Windows" include show windows as well as bay windows, sometimes called "bow windows," and "porticoes" and "porches" embrace marquees, within Laws 1854, c. 9, conferring on cities the power to regulate certain obstructions in the street.—

City of Baltimore v. Nirdlinger, Md., 102 Atl. 1014.

90. **Navigable Waters**—Interstate Boundary.—How land that emerges on either side of interstate boundary stream shall be disposed of as between public and private ownership is to be determined according to the law of each state.—*State of Arkansas v. State of Tennessee*, U. S. S. C., 38 S. Ct. 301.

91. **Negligence**—Presumption of Death.—Where a customer went to a counter to purchase a jardiniere, the presumption obtained in action for his death by falling down an elevator shaft, in the absence of contrary evidence, that in going behind the counter he did so to continue his examination preparatory to purchasing.—*S. H. Kress & Co. v. Markline*, Miss., 77 So. 858.

92. **Principal and Agent**—Scope of Agency.—Under Civ. Code Ga. 1910, § 3582, declaring that, without consent of principal, agent employed to sell cannot be himself purchaser, sales agent is not authorized to sell in foreign market under arrangement by which he assumed possible loss and took profits, that amounting to sale to agent.—*Atlantic Turpentine & Pine Tar Co. v. Mosin & Turpentine Export Co.*, U. S. D. C., 247 Fed. 618.

93.—**Notice.**—Where notes bearing notation as to surety's liability were returned by seller's branch office, with request that such notation be made on a separate paper, court held justified in finding that this was with knowledge and authority of seller.—*Emerson-Brantingham Implement Co. v. Sylvester*, Colo., 171 Pac. 88.

94. **Railroads**—Stoppage of Trains.—Under Vernon's Sayles' Ann. Civ. St. 1914, arts. 6557, 6672, railroad company ordered to stop trains and waiting for proceedings against it instead of instituting suit to test validity of the order, held properly subjected to penalty for each failure to stop.—*Gulf, C. & S. F. Ry. Co. v. State of Texas*, U. S. S. C., 38 S. Ct. 236.

95. **Reformation of Instruments**—Accommodation Note.—A mortgage given as security for an accommodation "note to F. and B.," where-as the note was in favor of W. O., executed at the F. and B. bank, evidencing a loan made through the good officers of the bank, could be reformed in a foreclosure against the accommodated party.—*Webster v. Rogers*, Ore., 171 Pac. 197.

96. **Release**—Inadequate Consideration.—In action by city employee for injury while caring for fire horses, where paper relied on as release was signed when parties were mutually mistaken as to extent of injuries, and where sum named therein was manifestly inadequate, release was not binding.—*Smith v. Kansas City*, Kan., 171 Pac. 9.

97. **Sales**—Breach of Contract.—Where goods are bought under agreement to give notes for part of purchase price and buyer, after receiving the goods refuses to execute and deliver such notes, the seller, without awaiting the expiration of the credit, may maintain action for breach of the agreement.—*Hedges v. Blythe*, Okla., 171 Pac. 16.

98.—**Fictitious Purchaser.**—Where horse dealer, dealing directly with the buyer, sold horse and took notes and mortgage for price, buyer giving a fictitious name and residence, there was sale, voidable only between the seller and buyer or persons with notice of the fraud, but not as against innocent purchasers.—*Martin v. Green*, Me., 102 Atl. 977.

99. **Taxation**—Excise Taxes.—St. Mass. 1909, c. 490, pt. 3, § 56, imposing increased excise taxes on foreign corporations, but not upon domestic corporations, is not unconstitutional as applied to foreign corporation which had previously acquired land for automobile purposes, there being no proof that such land was not salable at reasonable price.—*Cheney Bros. Co. v. Commonwealth of Massachusetts*, U. S. S. C., 38 S. Ct. 295.

100. **Water and Water Courses**—Public Service Company.—Corporation engaged in supplying municipality and its inhabitants with water, though having indefinite franchise, is entitled to fair return, and value of its property should be reckoned on its present value as used.—*City and County of Denver v. Denver Union Water Co.*, U. S. S. C., 38 S. Ct. 278.

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WAR PRICES EXCUSING PERFORMANCE OF EXECUTORY CONTRACTS.

Two articles appearing lately in Central Law Journal, one entitled "Effect of War on Contracts—Questions in the British Courts," 85 Cent L. J. 412, and the sequel thereto: "The War and Contracts—Economic Impossibility Excusing Breach," 86 Cent. L. J. 224, have attracted some attention among the subscribers to this journal, as letters to our Editorial Department attest.

These articles are by our correspondent in Scotland, Mr. Donald Mackay, and show that English courts hold quite strictly to the rule that "where there is a positive contract to do a thing, not in itself unlawful, the promisor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance has become unexpectedly burdensome or even impossible."

War causes fluctuation in prices, greatly advancing them in some things and, possibly, destroying markets in other things. If the war, that brings this about, is a foreign war, generally it may be said that this is a circumstance that would come under the rule above stated. When it is a war by the country of one of the contracting parties, another principle may apply, and that is the status of the other party may either discharge from further performance or put the matter in abeyance until peace resumes her sway. But whether a war is a foreign war, pure and simple, or whether it is a war by the country of the contracting parties or by one or more, less than all, of such parties, there may come about an absolute or partial disappearance of the subject matter of the contract.

It is generally true that both parties to an executory contract contemplate that when time for fulfillment of contract obligations shall arrive the subject-matter out of which fulfillment is to be made shall be in existence. Exceptions stated in contracts as excusing performance pointedly are based on such existence and are taken as specifying things which add to burden of performance. The ordinary rule in construing exceptions is *Expressio unius est exclusio alterius*.

But Mr. Mackay, in his admirable articles above referred to, fails to call attention to a recent important British case which is so very instructive on the line referred to, and as exhibiting a modification of the strict principle of cesser of the subject-matter of an executory contract, that we refer to it quite extensively in this editorial. *Tennants (Lancashire) Ltd. v. C. S. Wilson & Co., Ltd.* 116 Law Time Reports, 780. This was an appeal from Court of Appeals reversing judgment of trial court for plaintiff, which reversal was in turn set aside by the House of Lords and the ruling of the trial court restored. The House of Lords reversed unanimously a majority in the Court of Appeals.

The facts show that the contract was made prior to the breaking out of war between Great Britain and Germany, on August 4, 1914; that it concerned deliveries by defendant of chloride of magnesium during 1914 and 1915, and its cancellation ten days after the breaking out of war. At that time plaintiff had a number of contracts with others for delivery of magnesium based on its contract with defendant. After demand by plaintiff for delivery, it appears that, notwithstanding refusal to furnish the magnesium, defendant notified plaintiff that the price of magnesium had advanced but it filled orders for others at advanced prices. Plaintiff stood on the contract. Defendant conceded that "there was no cancellation, but a suspension of deliveries under contract." Plaintiff claimed damages for refusal to deliver at the times

provided for and at the prices fixed, by the contract.

Lord Loreburn said: "Defendants had to show that the war caused a short supply of magnesium chloride, which hindered delivery. By short supply is meant, I think, that the quantity available to the seller was substantially less than his requirement. By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders. . . . The argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible . . . seems to me a dangerous contention, which ought not to be admitted, unless the parties have plainly contracted to that effect."

The opinion goes on to speak of the German source of supply, on which the sellers relied, being cut off by the war or as being greatly diminished temporarily, so that sellers could not have supplied plaintiff, even by paying higher prices, unless by disregarding "other contracts and other business necessities in order to satisfy" plaintiff. The opinion said that: "To place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfill one surely hinders delivery."

Viscount Haldane said: "To say that a merchant is not prevented from delivering to a customer when he gets either none or an insufficient supply of the article from the manufacturer, but is only so prevented or hindered when there is an impossibility or difficulty concerning the transport from him to the customer, would seem to me the height of absurdity."

Speaking of the difficulty or impossibility of delivery, it was said: "Where I think, with deference to the learned judges, the majority of the court below have gone wrong, is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. . . . If appellants had

alleged nothing but advanced price they would have failed."

Lord Shaw said the hindrance was in "such a way as to interfere with the conduct in a full business sense of the appellants' trade in magnesium chloride." This expression is somewhat more elastic than that by the other lords, but Lord Shaw goes on to say that "a mere fluctuation of price would not constitute" a hindrance.

Lord Wrenbury said: "There may be a rise of price without a shortage of supply. Rise of price is, I think, irrelevant, except that it may be evidence when coupled with other facts that there is a short supply."

It is true the lords were discussing specific exceptions excusing non-performance or suspension of performance, but there is nothing directly stated about shortage. There is a general clause following specific things, by way of exception, preventing or hindering the manufacture or delivery of the article. This clause would seem to be but a sort of form in all contracts and to be construed on the principle *eiusdem generis*.

What stands out in these opinions is the fact that mere change in prices caused by war cannot be set up for failure to deliver an article contracted to be delivered.

Mere rise in prices is no excuse for non-fulfillment. Also, it would seem that the fact that the shortage was caused by Great Britain's enemy was not a controlling fact. Any real shortage, however caused, would have had the same effect.

NOTES OF IMPORTANT DECISIONS.

DEAD BODIES—AUTOPSY BY OFFICIAL REQUIRED TO CERTIFY CAUSE OF DEATH.—The case of Woods v. Graham, et al., 167 N.W. 113, decided by Supreme Court of Minnesota, appears to us to stress unduly sentimental rights of relatives of a deceased in the latter's corpse.

Thus "syllabus by the court" in that case declares that: "It is no defense in an action

to recover damages caused by an autopsy performed on the body of the daughter of plaintiff, without the consent of the next of kin, that defendant or the attending physician was unable to ascertain the cause of death and performed the autopsy so as to be able to give a certificate as required by law, stating the cause of death."

This case shows the sustaining of a demurrer to defendant's answer and an affirmance of this ruling by the Supreme Court.

This answer set out that defendant was county physician, and attended decedent in a charity hospital; upon her death he was required to furnish to the official undertaker a certificate stating the cause of death, so that the undertaker could proceed with burial of the body. It was claimed by defendant that the autopsy he made was merely for the purpose of issuing such certificate, and that it was made in a decent and scientific manner and no incisions were made that were unnecessary. It appears that no notice was given to plaintiff of an autopsy to be made.

The State statute requires that no burial permit shall issue until proper certificate of cause of death shall be made and that any person having any duty in the premises must, on pain of being guilty of a misdemeanor, comply therewith.

The statute also makes it a misdemeanor to order dissection of a dead body except in cases "specially provided by statute," unless deceased by will authorizes it, or the coroner directs it, or the next of kin consents for the purpose of ascertaining the cause of death, and then only to the extent so authorized.

It seems to us that the statute contemplates action under wholly different circumstances. The part regarding certificate for burial purposes concerns acts prior to burial and the other part is in reference to dissection, as well after as before burial. The latter, therefore, is not under the state's police power; the former is. As the answer was found to be defective because it did not show compliance with a part of the statute by which the county physician was not governed the demurrer was wrongly sustained. Suppose the mother in this case had been notified and she had refused to consent to autopsy? Should the daughter's body have remained unburied?

It may be that procedure under the second part of the statute might be for scientific purposes or to find clues in poisoning cases or for other reasons not necessarily within police power; the first part of the statute

concerns nothing else than police power, and an honest attempt by an officer to comply with the statute ought to excuse him.

NUISANCE—NEGLIGENCE BY CONTRACTOR IN REPAIR OF A HIGHWAY.—The New Jersey Court of Errors and Appeals is, we believe, composed of more members than is any other judicial tribunal in this country. There sit on its bench 13 members, and in a recent case the judgment of a trial court, in non-suit, was affirmed by a bare majority of seven to six. *Lydecker v. Board of Chosen Freeholders of Passaic, et al.*, 103 Atl. 251.

This case shows an action wherein plaintiff claimed that he was injured by a bicycle on which he was riding on a highway recently covered with oil. The contract for spreading the oil in certain quantities was made by the Freeholders with the Standard Oil Company, and the petition alleged that the oil was spread in such excessive quantities as to make the highway dangerous.

Considering the case as respects the Oil Company, the majority held that the mistaken estimate by the freeholders of what performance of the contract would entail could not be said to make the highway inherently dangerous or that the spreading of the oil as the contract provided was "obviously liable to create a nuisance."

The dissent was in a brief opinion, which said: "I think the declaration charged negligence in putting oil in excessive quantity upon a public highway and that it is unimportant that the right to place oil there at all came from the contract with the board of freeholders. The gravamen of the complaint is the negligence, not the breach of contract. The contract was only the occasion or condition, and the duty to exercise care, while it arose from the contract in this sense, was independent thereof, and was the ordinary duty not to create a nuisance in a highway. . . . I think the judgment in favor of the Standard Oil Company should be reversed."

The majority, also, found in favor of the freeholders, upon the theory that there was no active wrongdoing by them in the premises. What they were guilty of, if anything, was in acts of omission, and this part of the ruling appears to have been accepted by the minority. Therefore, the difference among members of the court seems in one on a highway for a lawful purpose doing what is inherently dangerous under professed authority, by a board authorized to contract in regard thereto, and the performance of that act being

negligent, because as so performed it violates the rights of one entitled to have a safe highway.

It is conceivable that, as to freeholders they or the county they represent should not be liable for mere error of judgment in executing their duties. This would be true, though the error might be gross, as long as good faith guides their course. But the majority appear to concede that gross mistake by them would prevent their discretion to a contractor employed by them, being set up in contractor's defense.

EMINENT DOMAIN—DEFINITENESS IN POINTING OUT PROPERTY SUBJECT TO.—It must be conceded, that the exercise of the right of eminent domain is "latent and potential," until a statute may make it "active and efficient." Collier on Public Service Companies, § 74. How definite therefore must be the statute which brings this "latent and potential" right into activity and effect?

This question is suggested by a recent decision by Pennsylvania Supreme Court in the case of Croyle v. Johnstown Water Co., 103 Atl. 303.

In that case a water company sought to condemn land for the purpose of supplying the territory in the vicinity of certain named boroughs with water. It was said: "Counsel for appellant rely upon the case of Bly v. White Deer Mt. Water Co., 197 Pa. 80, 46 Atl. 929. But there the water company attempted to supply water directly to the public in townships and municipalities, to which the charter did not admit it. In the present instance the supply of water to outside territory is incidental."

Also it was said: "But aside from this, as the court below very properly said: 'If the true purpose of this condemnation was to furnish a territory beyond the original charter limits, that is a matter to be inquired into by the State upon an appropriate proceeding, but not by bill in Equity under act June 19, 1871, at the instance of a private person.'"

It seems to us very doubtful whether it lies within Statutory bounds thus to cut off inquiry into the rightfulness of a taking by eminent domain. And when a purpose is called incidental to the main purpose this does not greatly help. It is possible thus for a public service corporation to take on more and more power by a sort of accretion, and thereby lands that were not within original grant of power to it become subject to the exercise of the right of eminent domain.

In this case it seems that five boroughs were consolidated into a city and the company supplied it and "incidentally" supplied territory in its vicinity. And it was held that the main purpose being satisfied it could supply persons outside as a mere incident to the main purpose. But this does not dispose of the question whether this supplying not being necessary to the main purpose, condemnation of property for the incidental purpose was within the grant of the right to exercise eminent domain. It seems to us that it was not. It does not fall within the principle, that powers expressly granted by implication embrace all that is necessary for its rightful exercise.

PROGRESS OF THE TORRENS SYSTEM OF LAND REGISTRATION.

Despite much organized opposition and the strong objection of title attorneys, the so-called Torrens idea of title registration seems to be making progress. At least it is a frequent subject of debate at Bar Association meetings. At the last meeting of the Alabama Bar Association a paper was read by Col. Sam Will John, of Massillon, Ala., who spoke in favor of the extension of the principle of title registration by providing for state insurance of titles. On this point Col. John said:

"There may be connected with, or embodied in such a law, provision for raising a Fund, which is called an 'Assurance,' 'Indemnity' or 'Insurance' Fund, but by whatever name it is called, the sole beneficial purpose of such a 'Fund' is to afford indemnity for lands lost by reason of the fraud, negligence, or mistakes of persons charged with the duty of administering the law, and it is in no sense an insurance of the title for the very heart-foundation of this system is the Governmental Register of Titles, which the Certificate of Registration is conclusive evidence of an indefeasible title, in fee simple. This feature is necessary to a fair, equitable law and I would not advocate the passage of a law, with it left out, though several States have such one-sided laws."

On the much-debated question of the constitutionality of such legislation, Col. John gave a resume of the cases and criticised

some of the provisions of the early acts; but he contended that when properly drawn to meet the peculiar constitutional limitations of our form of government, such legislation is in every respect suitable to our institutions, and its benefits should not be lost by objections that have no real merit or are based solely on prejudice. On this point Col. John continues:

"The death blow to the Ohio Statute did not deter the legislatures of Massachusetts, Illinois, Oregon, Washington, California, Colorado, Minnesota and New York and other states to the total number of 37, from enacting statutes for registering land titles. And there can be no doubt that the provisions of these statutes are well within the established principles governing bills to quiet titles.

"The power of the state to provide for the adjudication of titles to real estate, not only as against residents, but as against non-residents who might be brought into court by publication was distinctly upheld in a very strong opinion by Ch. J. White, in the case of *American Land Co. v. Zeiss*, 219 U. S. p. 47, and is strongly stated in the authorities he cites.

"Even a casual consideration of these authorities will convince any lawyer that a statute embodying the principles of the Torrens Act, adapted to our judicial system under the Constitution, is clearly within the power of the Legislature to enact."

In reference to objections to the propriety of a state competing with private individuals in the business of title insurance, Col. John said that the old idea that governments could not exercise any function that was not purely governmental had been practically superceded by the new principle of sociological jurisprudence, that it was the duty of the state to do anything for the welfare of its citizens which, for any reason they were not able to do for themselves. In upholding the right of every state to provide insurance funds not for the purpose of going into the insurance business but in support of some new remedy or of some new right created, the speaker cited the Supreme Court's approval of the Oklahoma statute providing for a guaranty fund

to protect bank deposits,¹ and of the Washington statute providing for an insurance fund to guarantee payments under the Workmen's Compensation Law.²

Speaking of the practical working of such a law, Col. John said:

"The fees for registering titles and noting subsequent transfers, or liens, have usually been fixed at 1/10 of one per cent of the actual value of the property conveyed, and this small charge has produced a fund ample to cover all losses caused by any improper registration, and the surplus has enured to the benefit of the public treasury. After the first cost, which should be limited by law, the cost of subsequent transfers need not be more, or very little more than our fees for recording.

"A few years ago, no bank would lend on mortgage on land, but thanks to the last Congress, banks for the express purpose of lending to farmers on mortgage have been established and a land owner can now borrow money on land at low rates of interest and on long time. In states having a system of Governmental Registration of land titles land owners who avail themselves of it will have a distinct advantage over those who apply for Farm Loans and whose lands are not 'Registered.'"

A. H. R.

(1) *Noble State Bank v. Haskell*, 219 U. S. 104.

(2) *Mountain Timber Co. v. Washington*, 243 U. S. 319, 37 Sup. Ct. Rep. 260.

PROVIDING FUNDS THROUGH INSURANCE FOR PAYING ESTATE OR INHERITANCE TAXES.

The proverbial certainties, "Death" and "Taxes" have become concomitants under both State and Federal Laws taxing the estates of the dead. Death taxes, their amount, manner and moment of incidence and ways and means of payment are important considerations not to be overlooked by the prudent and foresighted in making taxable disposition of property.

Raising out of the estate the amount required for taxes may sometimes be a problem for the legal representation. The writer of a recent article advocates the purchase

of life insurance in a sum calculated to meet such demands, saying:¹

"In the public prints attention has been called recently to the purchase of insurance in very large sums by prominent financiers, men possessing great wealth, whose individual fortunes are so large that it was quite apparent that the purchase of the insurance by them was not to augment their estates on death. The public announcement then made was that they procured this insurance to provide funds from which the Decedents Estate Taxes could be paid, thus enabling them to transmit their estates to such persons and in such amounts as they might desire, without alteration of their purposes because of the necessary compliance with the provisions of the Decedents Estate Tax. The effort made by them is not an evasion of the taxes, but a provision for the acquisition of cash funds adequate and sufficient to meet tax demands. This effort is particularly praiseworthy, as it tends to relieve the burden, very frequently thrust upon those incapacitated to pay the same, of those taxes which are assessed by the State upon property left by a decedent on his demise. * * *

"In consequence of the multiplicity of taxes and the lessening of estates thereby, any expedient which will relieve the beneficiaries of an estate from the burdens of the tax and pass each estate in its entirety to those for whom it has been accumulated, should receive from those who will leave estates liable to taxation, mature, grave and careful consideration.

"The plan adopted by many wealthy men has been to procure insurance on their lives in an amount commensurate with the liability which will be imposed upon their estates and their beneficiaries at their decease, by the State and Federal Governments. Familiar with the amount of their respective estates, and with the present rate of taxation, an approximation can easily be made as to the sum needed to satisfy the tax. * * *

It is not advisable in any well managed personal affairs, to carry constantly a sufficient sum in bank over and above liabilities, direct and contingent, to enable, in the event of a sudden demise, an executor or administrator to have in hand the necessary funds to satisfy tax obligations. Whether the es-

tate be large or small, there is no likelihood that it will continuously have in bank sufficient funds to meet the tax demands. If the estate be small, its size necessarily demands the continued investment of all its funds to obtain adequate income and returns. If the estate be large, its investments are necessarily numerous and widely divergent, and will require ample funds to preserve their stability and character. The continuous retention in bank, of a sum necessary to meet the decedents' estate tax, uncertain in point of time, is repugnant to the business instincts of every conservative, well-balanced, thoughtful business man."

The author of the article in question, eminent counsel to one of the large insurance companies, is plainly "pumping water to his own mill."

Changing Rates and Criteria.—If proceeds of insurance policies be made payable, by way of reimbursement, to a number of individual beneficiaries, thereby passing entirely without tax under the various statutes now in force, there is no guarantee of the continued grant of such exemption once taxing officials realize the frustration of revenue involved. Furthermore, the ever-changing rates and criteria of such taxation under the various statutes would defy the shrewdest actuary's estimate of the amount of insurance to be so allotted. Added to the difficulties of cutting the insurance to fit the tax and keeping the fit under changing statutes are the further possibilities of intervening deaths of beneficiaries, necessitating constant readjustment and reinsurance. The author elsewhere in his article frankly concedes these and other objections and suggests that the policies be payable to the *estate* of the insured, "with directions in the will that all taxes be paid with the proceeds thereof." Of course if payable to the estate, such funds thereby without question become taxable and since the same uncertainties continue as to the amount of tax required based upon statutes subject to variation from legislature to legislature, neither is there assurance in that case that the proceeds of the most generously conceived policy will suffice to pay *all* taxes

(1) In the Economic World, Jan. 12, 1918.

when they have finally accrued upon the death of the insured.

The question, therefore, narrows down and might be stated thus: "Shall I contract for some insurance so that my taxable estate, thereby increased, may have more funds wherewith to pay part or all of the tax?" Under the circumstances one dollar in the bank would seem to be worth two dollars in insurance. The propertied class to which the suggestion of insurance for the purpose specified is so plausibly addressed no doubt realizes the value of compulsory savings in the insurance plan but continues to be fully aware of the greater profit in personally accumulating a reasonable cash reserve for such exigencies of taxation or otherwise as may arise. The facilities provided by the banks for this purpose are not yet equaled by the insurance companies.

It is not to be denied that it is desirable for the representatives of estates to have some ready cash in hand as soon after they have qualified as possible, for the purpose of paying debts, attorneys' fees and other expenses, the aggregate of which indeed may exceed the amount required for taxes. As yet, however, the suggestion of additional insurance for these requirements has not been made.

Statutes Make Liberal Time Allowance.—As a matter of fact most statutes imposing inheritance or death taxes make liberal allowance of time within which payment may be made less discount if the privilege is granted at all. About one-half of the statutes of the various states allow no discount whatever. Most statutes are likewise longsuffering in allowing time within which payment may be made without infliction of penalty and in some cases no penalty for delayed payment is imposed. Furthermore, most of the various statutes provide for the immediate payment of only that portion of the tax due upon immediately ascertainable beneficial interests, leaving for future payment the tax upon contingent interests.

On the other hand if the tax upon such contingent interests is made presently payable as in New York the statute may be complied with as to such portion of the tax by depositing securities belonging to the estate, the income meanwhile being payable to the beneficiaries and no cash is required. Under the Federal statute it is proposed that Liberty Bonds be accepted in payment of the estate tax and in that case, who would not prefer the Liberty Bond to insurance? In short, the tax gathering bogey is not apt to be so precipitately or unfortunately fearful as the insurance solicitor paints him.

Insurance and Bank Deposits.—But granting that necessity arises at the inception of administration for the cash payment of taxes (for instance, under the requirements of some of the notorious "holdup" States) if the assets of the estate are the gilt-edge investments supposed, might not the insurance companies gladly be purchasers from the estate in the emergency? Again, granting that the suggested plan of insurance be favorably considered at all it must be recognized that its appeal is limited to the restricted class of acceptable risks. Those who are not within this favored class must necessarily overcome their repugnance at leaving some ready cash in the banks. So, too, if the insurance rates, applicable at the age when the tired business man ordinarily begins seriously to think of paying his death taxes, leave him dejected, he also must join the line of the rejected at the window of the bank's receiving teller. That line is not likely to grow shorter by reason of the schemes cleverly advocated by the insurance solicitors.

In conclusion it is not apprehended that the volume of bank deposits will be depleted even in case the suggestions of insurance for taxes be generally acted upon. The reserves held by the insurance companies to meet such taxes cannot be left lying around in a bureau drawer awaiting the demise of the insured. The insurance companies must either carry constantly a suffi-

cient sum in bank to meet their obligations to the clamorous tax gatherers or must invest in securities which may need to be realized upon if a sufficient reserve is to be kept intact.

After all it comes down to this: "*Shall I have my representative pay my death taxes or shall I employ and pay the insurance company to do my banking and my tax paying?*"

Jos. F. McCLOY.

New York, N. Y.

MASTER AND SERVANT—INJURIES IN COURSE OF EMPLOYMENT.

POLAR ICE & FUEL CO. et al., v. MULRAY.

(Appellate Court of Indiana, Division No. 2.
April 2, 1918.)

119 N. E. 149.

Where a servant, employed to check and collect for shortages of master's employes delivering ice, was shot and killed by one of such employes as a result of a quarrel over such collection, such servant's death arose out of the employment.

IBACH, C. J.: While appellee's husband was at work at the plant of appellant another employe shot and killed him. Appellee filed her claim for compensation before the Industrial Board under the Compensation Act, and compensation was allowed.

The only claim made by appellant is that the evidence does not sustain the finding of the Industrial Board that the accident arose out of decedent's employment. The uncontested facts are substantially the following: John Mulray, decedent, was employed by appellant to keep a record of ice taken from its ice plant to be sold by its drivers, and to require each to account for the quantity taken out by him when he returned after delivering each load. If there was any shortage it was Mulray's duty to collect the amount of the shortage in cash, and if not collected he then reported it to another bookkeeper, who charged the amount of the shortage against the delinquent driver, and the amount was deducted from his pay. Spencer, the man who shot Mulray, was one of the drivers, and some days before the shooting

Mulray had discovered that Spencer was short, and his attention was called repeatedly to it, and a settlement requested by Mulray. On these occasions Spencer would become enraged and accuse Mulray of failing to keep his account accurately, and for some time prior to the fatal shooting he seemed to hold much enmity toward Mulray. On the day of the shooting he (Spencer) had been arguing the matter with the bookkeeper, and as he left her he said, "Yes, and I will fix John (meaning Mulray) too." He then went to the paymaster and argued with him about the pay which he had been given, and from there went to decedent, who was in the "scale office," and there created much disturbance, and sought to do Mulray harm. He there said to him, "You come out and I will fix you." He also called Murray a son of a b—, and Mulray said two or three times, "You call me a son of a b—," and then Spencer said again, "You come out and I'll fix you." Mulray then said, "If you don't get out I will shoot you down," and went to a drawer under the scale and took out a revolver. When Spencer saw it he ran out the door, Mulray following, and as soon as he got out he fired two or three shots. He then returned, saying something about running Spencer up the railroad track. He took out the empty shells, reloaded the revolver, and replaced it. It was one used by the night-watchman. Spencer went down on Virginia avenue and bought a secondhand revolver, and about one hour later came back to appellant's plant and shot Mulray as he was seated at his desk in the office.

There is also some evidence showing that some of appellant's drivers were rough men, and particularly so on Saturday, pay day, when they generally drank liquor. This was particularly true of Spencer, with whom there had been considerable trouble about other conduct on his part, and he had manifested a malicious disposition. It is conceded by appellant that Mulray's death was the result of an accident received in the course of his employment with it, but the contention is that it did not arise out of such employment.

The rule is well established that a claim for compensation will not be denied simply because the accident occurred by reason of the unlawful and felonious act of some third person, if the employe actually sustained it by being specially and peculiarly exposed by the character and nature of his employment to the risk of the danger which befell him. In other words, when the injury results from the conditions surrounding an employe at the time of the accident and under which he was re-

quired to perform his duties, then generally speaking, it arises out of the employment. *Union Sanitary Mfg. Co. v. Davis*, 115 N. E. 676

The facts here show that decedent was performing a character of service for his employer which might at any time cause some personal grievance against him on the part of other employes with whom his duties required him to come in daily contact, so that when they were so angered at him or when under the influence of liquor they were liable to do him harm, still he was required to remain at his place of employment, surrounded by these dangers which finally led to and produced his death. Under such circumstances it may very properly be said that the accident which did occur was a risk reasonably incident to decedent's employment.

Appellant relies principally upon the case of *Union Sanitary Mfg. Co. v. Davis*, *supra*, in which this court stated the same rule which has been declared by the several courts considering like questions. The facts of that case are clearly distinguishable from the present. There the claimant on his own account provoked a quarrel with another employe in another department, and with whom his employment did not require him to be associated or to come in contact, nor to whom he was required to go with any complaints, and it was made to appear that there was no causal connection between Davis' duties and his injuries. There are other distinguishing features, but this is sufficient. As bearing on some of the propositions now under consideration, the authorities cited in that case, however, are instructive. See, also, *United Paperboard, etc., v. Lewis*, 117 N. E. 276; *In re Loper*, 116 N. E. 324. In the case last cited this court said:

"The test to the right to compensation under such acts, in so far as concerns the element now under consideration, is whether the injury resulted from some peril incident to the employment; whether the cause of the injury, although not foreseen, may reasonably be deduced from the circumstances and surroundings peculiar to the place, and under which the workman was required to perform his labors, regardless of whether such perils or surroundings involve negligence on the part of the employer."

The evidence also shows that Mulray was a peaceable man, entertaining no ill will against Spencer, while the latter was of a quarrelsome disposition, and for at least ten days before the shooting occurred as heretofore disclosed by the evidence had made threats against decedent to do him harm, both to him personally and to others. One witness stated, "When ever decedent called his attention to any shortage he got mad and sought a personal en-

counter with him [Mulray]." Yet it was decedent's express duty to deal with all these drivers daily, and about a subject which might and did often awaken in them a spirit not only of resentment, but of actual antagonism, because it affected a matter of deep interest to them—their pay. In this particular instance it is quite reasonable to infer that the shooting occurred by reason of decedent's persistent endeavor to collect shortages due his employer, and this is particularly true when considered in connection with the character of the man as shown by the record who did the shooting.

While it may be said that the inference that the unfortunate accident in the case was the result of a risk reasonably incident to Mulray's employment, and therefore arose out of his employment, is not the only inference which might be drawn from the evidence, yet it is a very reasonable one, and since the Industrial Board has so concluded we are required to uphold the award.

Award affirmed.

NOTE.—Assaults on Employe When in Course of Employment Under Workmen's Compensation Acts.—The instant case is one which shows that American courts are in travail to distinguish injuries to employes under Workmen's Compensation Acts from injuries sustained by them in the ordinary relation of master and servant. As said in the late case *Re McNicol, et al.*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A, 306, wherein an employe suffered injury from an assault by another employe, "decisions of English courts before adoption of our act are entitled to weight." This is on the familiar principle, that when one sovereignty embodies into its own law that of another it takes it with prior construction thereof.

The McNichols case held that where an employe was while performing his duties as a checker assaulted by an intoxicated fellow workman, employer was liable. This fellow workman was known by his employer to be in the habit of getting drunk and when in this condition to be quarrelsome and dangerous, but nevertheless was permitted to continue in employment. The court said: "A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion."

This case is distinguished from one where it was held, that an assault by a drunken stranger upon an employe engaged at his work on the highway, where it was held there was no liability of employer. *Mitchinson v. Day Bros.*, 1 K. B. 603, 108 L. T. N. S. 193.

It was said in the latter case that the risk of being assaulted by such a drunken stranger is not in any way especially connected with or incident to the employment of a carter on the highway.

And it was held in two cases that where a stone is thrown in anger by one workman and injures another this does not, under the facts, present a

case of liability by employer. *Armitage v. Lancashire & Y. R. Co.* (1902) 2 K. B. 178, 86 L. 7. N. S. 883; *Claytum v. Hardwick Colliery Co.*, 7 B. W. C. C. 643. The Armitage case construes with strictness the words "out of and in course of employment," saying recoverable injury is that which "as matter of law" arises out of employment, and does not cover mere wrongful act by one against another. "The act does not provide an insurance against everything that may happen to the workman while he is employed." In this case it was said: "The accident arose from an act done by another workman entirely outside of the employment of the man who did the act and of the injured man."

But it has been held that if an assault is likely to happen because of the very nature of the doing of the work by a workman it arises out of his employment.

Thus in *Linn Joint Dist. School v. Kelly* (1914) A. C. 667, 111 L. T. N. S. 306, the House of Lords held by majority ruling that where an assistant school teacher was willfully injured and killed by school boys under his charge, his mother could recover from his employer for his death.

There were elaborate opinions in this case, the Lord Chancellor, Viscount Haldane, being with the majority. In his opinion he said: "If we are to consider the principle of the *Workmen's Compensation Act* as *res integra* I should be of opinion that the principle was one more akin to insurance at the expense of the employer of the workman against accidents arising out and in the course of his employment than to the imposition on the employer of liability for anything for which he might reasonably be made answerable on the ground that he ought to have foreseen and prevented it. I think that the fundamental conception is that of insurance in the true sense."

Lord Reading, agreeing with the Lord Chancellor, said: "If your Lordships were to hold that because a workman was injured by the design of another he was excluded from the benefits of the statute, strange results would follow. The gamekeeper who is set upon by poachers, the warden who is attacked by prisoners, the ticket collector at a railway station who is assaulted by a passenger, the night watchman at a bank who is struck by a thief, are instances of workmen who would be excluded from the right of compensation, if this appeal were allowed notwithstanding that they were injured while performing the duties of their employment. It is difficult to see why the legislature should have drawn this sharp distinction and have provided that while the employer is bound to compensate even the workman whose injury is attributable to his own serious and willful misconduct, he is to escape the payment of compensation to the workman who in the performance of his duties is injured by the design of another."

Some American statutes forbid recovery where injury results from a workman's "own serious and willful misconduct," but does not the idea obtain that if injury might be foreseen from acts, either willful or negligent, and those by a third person are reasonably foreseen or should be, it

comes in under the "insurance in the true sense," as expressed by Viscount Haldane?

The injury of which this case treats was by students in charge of the teacher entering into a conspiracy to assault him. The teacher persisted in doing his duty notwithstanding threats of assault. Had he done otherwise there would have been compulsory abandonment of his duties, and demoralization of the school.

In *Weekes v. William Stead, Ltd.*, 111 L. T. N. S. 693, the injury was from assault by a stranger on a foreman who was a furniture mover. He had the duty to select and reject men applying for employment. On his refusal to give the stranger work he was assaulted. There was evidence that the foreman had to deal with men of a rough class among those seeking employment and those in the position of foremen had occasionally been assaulted. The yard where the foreman worked was "an exceedingly rough place." It was therefore thought there was evidence tending to show "a special risk incidental to this employment," and for the injury occurring there was liability. *Cozens-Hardy, M. R.*, referred to *Mitchinson v. Day Bros.*, but distinguished this case from that in that there was no evidence of a special risk.

It would seem, therefore, that the true test is, that, if an injury is or ought to be foreseen by the master, then if it happens the latter may be liable. This is a rule which appears to us within the spirit of Workmen's Compensation Acts, and that English decision ought to be looked to for guiding cases in the application of this principle. If the anticipation extends to willful acts by others, they come in as well as others.

C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 149.

Employment; Civic Duty; War—Acceptance of professional employment in respect to claim of exemption from army draft, and of compensation therefor; Not disapproved.—I have lately been consulted by a man who has for thirty years and upwards been a client of this office. He was seeking to secure for his son exemption from military service under the so-called Selective Draft Law. The claims for exemption were of two kinds, one being a matter for the Local Board in the first instance with right of appeal to the District Board; the other being a matter within the original jurisdiction of the District Board. It seemed necessary to supplement by affidavits the official forms issued by the respective boards. No official forms were prescribed for such affidavits.

The employment came to me unsolicited; I had no reason to doubt the good faith of my client; and it seemed to me that the construction of the rather long and involved regulations, the drawing of the necessary distinctions between matters of original jurisdiction and matters of appellate jurisdiction, and the drafting of affidavits which should set forth facts and not conclusions, were tasks for a lawyer rather than for a layman. I therefore accepted the employment and performed the service. Furthermore, since my client is able and (presumably) willing to pay, I expect in due course to send him a bill for a reasonable fee.

In view of the recent utterance of another Bar Association on this subject, I wish to know whether in the opinion of your committee:

(a) I have acted unprofessionally in rendering the service;

(b) It will be unprofessional to make a reasonable charge for the service.

ANSWER No. 149.

In the opinion of the committee the questions should be answered in the negative.

In reaching this conclusion the committee has been governed by the following considerations:

It is the duty of every citizen to obey the law, and in this hour of the nation's crisis the duty is made more immediate and more imperative only because of the crisis. The President has called upon every citizen to do his full share in uniting the nation in one supreme and effective sacrifice. In answering this call the lawyer has his duty to perform. Primarily he should assist in the enforcement of the law, and give without stint his services to that task. The exemption rules in the selective draft are part of the law. They are in the law not for any individual's private good, but for the good of the nation. Like the provisions for conscription, they are to be observed. In aiding in their observance, in the interpretation of the law, in applying the rules to the circumstances of particular cases so that the law and the facts may be presented to exemption tribunals, the lawyer is merely performing that service for which he is specially qualified and commissioned. In aiding those who seek clear exposition of the law or in aiding those whose cases come before such exemption tribunals we see no ethical impropriety. We take it for granted, of course, that the lawyer will be mindful of the obligations imposed upon him upon these occasions, as upon all others; he will not fail to speak the truth, to defend the weak, to uphold the law, and to see that no injustice is done or error

made in the administration of the law. We take it for granted also, that he will not consciously lend himself to the aid of the slacker or the shirker, either with or without pay, nor solicit employment from those seeking exemption. His services should be available only to those who really need his assistance and advice either in determining their rights or their duties under the statute and rules, or in presenting their situation to the proper tribunal.

So far as the matter of compensation for services of this character is concerned, we think that this must be determined by the lawyer individually in each particular case, and that if the lawyer is disposed to give his services gratuitously, he is free to do so as he would in any case justifying gratuitous service.

At a regular meeting of the board of directors of the New York County Lawyers' Association, held October 4, 1917, the following resolution was adopted:

"Resolved, That the Board approves the proposed answer submitted to it by the Committee on Professional Ethics to Question 149, and adopts the same as a correct expression of its views on the subject concerned, and that it be published in the usual manner, including in said publication the action of this Board."

SUPPLEMENTAL ANSWER No. 149.

Since the original answer was formulated and announced the new Selective Service Regulations prescribed by the President under the authority of the Selective Service Law (Act of Congress May 18, 1917) have been made public. These regulations contemplate and establish by Sections 30, 45 and 46 the organization throughout the United States of Legal Advisory Boards "for the purpose of advising registrants of the true meaning and intent of the Selective Service Law and of these Regulations, and of assisting registrants to make full and truthful answers to the questionnaire, and to aid generally in the just administration of said Law and Regulations."

In pursuance of these Regulations Legal Advisory Boards have been formed throughout the United States. The regulations provide (Sec. 30):

"All members of the Bar should make their services available to the Legal Advisory Boards to be constituted by the Governor as hereafter provided."

The Regulations also include the following:

"The Governor shall call upon all members of the Bar within the State, and, if necessary, upon competent laymen to offer their services to such Legal Advisory Boards for the purpose

of being present at the headquarters of the Local Boards and rendering aid and advice to registrants."

And again:

"It should be the pride of every lawyer that no registrant within his district is without competent legal advice and assistance in preparing all papers that such registrant is required to submit in the process of the selection of citizens of this nation for duty in the present emergency."

And again (Sec. 46):

"All lawyers and physicians should regard it as their duty to identify themselves with the Advisory Boards provided for in Sections 44 and 45 and *freely and without compensation* to give their best service to the Nation. It is inconsistent with this duty for lawyers to seek clients for the purpose of urging and advocating individual cases in any other way than as disinterested and impartial assistants of the Selective Service system."

This Committee is of course in the most thorough accord with the principles of these Regulations, parts of which have been quoted herein.

CORRESPONDENCE

MEETING OF THE BAR ASSOCIATION OF HAWAII.

April 3, 1918.

Editor, Central Law Journal:

Yours of March 18th at hand. Would say that the Bar Association of Hawaii will have its annual meeting for the election of officers on Wednesday, May 29, 1918, in the rooms of the Stock Exchange, Honolulu, T. H. The absorbing question during the past few years in Hawaii has been the justification of using the judicial position in Hawaii as the means for paying the political debts of the National Administration. Aside from the general question of the relation of politics to judicial preferment, Hawaii has been agreeably surprised, from time to time, by the calibre of judges bequeathed to it. In all probability, the Bar will further consider ways and means of assisting the National Administration in the present crisis.

Very truly truly,
ALBERT M. CRISTY. Secty.

MEETING OF THE ARKANSAS BAR ASSOCIATION.

Editor, Central Law Journal:

Please be good enough to note in the Journal that the date of the meeting of the Bar Association of Arkansas has been changed to May

30 and 31. The date first selected was later ascertained to be the date of the state primary election. The program will consist of the annual address by the president, T. C. McRae, of Prescott, Arkansas, on the subject: "The Lawyer in the Present Crisis." The balance of the program will consist of discussion of the various recommendations of the committees of our Constitutional Convention, which will meet in July.

Yours very truly,
ROScoe R. LYNN, Secty.
Little Rock, Ark.

BOOK REVIEWS.

SCHOULER ON PERSONAL PROPERTY, 5th EDITION.

The first edition of Schouler on Personal Property appeared in 1873. At the time the subject was undertaken it seemed to the author, as Mr. Bishop observed, that law books had not to any great extent treated the law of personal property under a separate head, and such treatment was really a desideratum in legal literature. He therefore essayed to supply that desideratum. He produced a book that took rank as a standard and now in less than fifty years later the fifth edition appears.

Mr. Schouler is the author of many excellent works, all of standard character, and the treatise on personal property has become so well known to the profession that it is a work of supererogation to tell about this enlargement of the earlier editions. Suffice it to say, it brings this subject down to date and annotation of later cases is excellently done, assistance thereto being given by Mr. Arthur W. Blakemore, of the Boston bar. This work is in one volume of nearly 900 pages, is of first-class typographical quality, is bound in buckram and comes from the house of Matthew Bender & Company, Albany, N. Y., as its publishers, with their imprint of 1918.

CORPUS JURIS, VOL. 13.

This most recent volume of the Corpus Juris carries the subject matter of the set alphabetically, down to and including the term "Corporate." This leaves the great subject of Corporations for the succeeding volume.

There are three important treatises in this volume, towit: Contempts, in 108 pages; Contracts, in 584 pages, and Copyright and Literary Property, in 298 pages.

The article on Copyright and Literary Property is one of the best, if not the best, treatise on this subject. It is more exhaustive in decisions on this subject than any text book we have examined and the law is stated with great clearness.

The subject of Contracts is also very thoroughly treated. If any criticism would be justified it would be that the general subdivision is too minute and casual to be scientific. For instance, subdivision XII, Termination and Rescission, could more properly be treated as sub-heads under Discharge, as it is in Austin's simple classification. In the last edition of Huffcutt and Woodruff's Cases on Contracts the author declares that Anson's subdivision is classical, having served as a model for practically all subsequent treatises. Under Anson's classification, there are four outstanding subdivisions: Formation—Operation—Interpretation—Discharge. This with the subdivision of Actions which is omitted in some texts and case-books and included in others forms a skeleton easily retained in mind.

But this criticism, if indeed it is a matter of criticism at all, does not detract from the writer's exhaustive treatment of the subject and the careful and fine distinctions that are made in the notes. Following the policy of Corpus Juris, cases in the notes are not bundled together in large masses but are distinguished both as to fact and principle, thus conserving the time and labor of the practicing lawyer.

Printed in 1263 pages on this paper and published by the American Law Book Company, New York.

BOOKS RECEIVED.

Notes to Statutes of Indiana. A Continuous Supplement to the Statutes of Indiana. 1917. Edited by B. F. Watson, of the Indianapolis Bar. Author of Watson's McDonald's Treatise, Watson's Statutory Liens, Watson's Works, Practice, etc. Subscription price, \$4.00 a year. National Annotating Company, Crawfordsville, Ind.

HUMOR OF THE LAW.

An official of the board of health in a town not far from Boston notified a citizen that his license to keep a cow on his premises had expired. In reply to this letter, the official received the following communication:

"Monsieur Bord of Helt—I jus get your notis that my licens to keep my cow has expire. I wish to inform you, M'sieur Bord of Helt, that my cow she beat you to it—she expire t'ree weeks ago. Much oblige. Yours with respeck.

"Pete ———."
—Boston Transcript.

Some years ago there resided at North Judson, Indiana, a lawyer whom we will call Simon, who was not only a good lawyer but was somewhat of a wit and a great wag. One of Simon's clients had given his promissory note to some party in Chicago. The Chicago party, having exhausted all other remedies to collect the note, brought suit in the justice court at North Judson. On the day of the trial a young lawyer came down from Chicago to try the case. He was immaculately dressed; his coat, vest and trousers were of the latest cut, trousers properly pressed and turned up at the bottom, white cuffs and a faultless white tie adorned the gentleman, and across his breast from one vest pocket to the other was a beautiful gold watch chain.

Both Mr. Simon and the Chicago lawyer had visited several of the "thirst parlors," the Chicago lawyer taking a drink or two, and always by himself.

Simon's speech to the jury kept far from the facts in the case, but he won his point. He said:

"Gentlemen of the jury, you all know Simon. Simon's trousers are not pressed, neither are they turned up at the bottom, they bag at the knees. Simon has no new suit, the one he wears you have all known for the last ten years. Simon has no stand-up collar, neither has he a white tie. Simon has no gold chain stretched across his breast, but, gentlemen of the jury, one thing you do know: when Simon has money you all have money, and when Simon drinks you all drink. Did any of you gentlemen drink with plaintiff's attorney when he drank this morning? Not one. I thank you, gentlemen."

It is needless to say that Simon won his case.

WEEKLY DIGEST

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1. Alteration of Instruments—Materiality.—The addition of a seal after the signature of the maker of a note is a material alteration.—*Bowman v. Berkey*, Pa., 103 Atl. 49.

2. Arrest—Exhibiting Warrant.—Arrest by special constable whose authority is unknown to plaintiff is wrongful when he refuses to exhibit warrant pursuant to plaintiff's request.—*Ridge v. Piedmont & N. Ry. Co.*, S. C., 90 S. E. 158.

3. Assignments—Unfinished Work.—Contractor's assignment of "moneys due" under the contract passed a fund which was not yet payable, but would become payable on securing certificate of completion by the department of water supply, gas and electricity; the work being unfinished.—*Hitchings v. Central Electrical Supply Co.*, N. Y., 169 N. Y. S. 611.

4 Attorney and Client—Contingent Fee.—A contract, giving attorney certain contingent fee if case was "tried" in Supreme Court and affirmed, covers situation where appeal was defeated in Supreme Court, although case was not contested there on its merits.—*Clancy v. Kelly*, Iowa, 166 N. W. 583.

5. Principal and Agent.—Where attorney acts in good faith, within scope of his authority, in representing his client, his acts of commission or omission will be regarded as acts of his client, and his negligence as negligence of client.—*Sayer v. Lee*, S. D., 166 N. W. 635.

6. Bankruptcy—Adjudication.—Under Bankruptcy Act July 1, 1898, § 70a(5), adjudication in bankruptcy does not terminate or dissolve

contractual relations of bankrupt, but vests in trustee option to assume or renounce executory contracts of bankrupt.—*In re Berry*, U. S. D. C., 247 F. 700.

7. Discharge.—A bankrupt, by securing the renewal of notes by means of a materially false statement in writing, held to have obtained property thereby, which barred his right to a discharge, under Bankruptcy Act, § 14b(3), as amended by Act Feb. 5, 1903, § 4.—*Samet v. Farmers' & Merchants' Nat. Bank of Baltimore*, U. S. C. A. A., 247 F. 669.

8. Proof of Claims.—Holders of the joint and several obligations of the members of a partnership, signed in their individual names, but executed in connection with a partnership transaction, are entitled to prove them against both the partnership estate and individual estates of partners.—*Robinson v. Seaboard Nat. Bank of New York*, U. S. C. C. A., 247 Fed. 667.

9. Bills and Notes—Irregular Indorsement.—Where collateral security of note became unsatisfactory before maturity, one indorsing it as additional security was an "irregular indorser," and assumed an obligation in the nature of a guaranty of the payment of a pre-existing debt.—*Zadek v. Forchheimer*, Ala., 77 So. 941.

10. Negotiability.—Where notes given for purchase of lighting plant were to be paid out of percentage of earnings of plant, held, that they were non-negotiable under St. 1917, § 1675—1, subd. 3, requiring negotiable instruments to be payable on demand or at fixed or determinable time.—*Bank of Evansville v. Kurth*, Wis., 166 N. W. 658.

11. Negotiability.—Under Negotiable Instruments Act, note is not negotiable if payable to known and existing person unless he indorses it, or, if payee's name is inserted, unless such payee indorses note.—*First Nat. Bank v. Wood*, S. C., 95 S. E. 140.

12. Brokers—Commission.—A letter closing correspondence, whereby vendor authorized brokers to sell his lands, stating that commission would be paid upon all lands listed in such letter, but stating that such was only a partial list of lands vendor had to offer, does not preclude recovery of commission for sale of lands not listed therein.—*M. N. Clark & Co. v. Monson*, Iowa, 166 N. W. 576.

13. Carriers of Goods—Consignment.—Where consignor deposited draft payable to himself and properly indorsed with bill of lading attached with bank, to which consignor was indebted and received credit, held, that consignment was not subject to attachment, as special property passed to bank.—*Owensboro Banking Co. v. Buck*, Ala., 77 So. 940.

14. Delay.—Carrier receiving carload of potatoes on afternoon of September 1st, to be transported with "reasonable dispatch," and delivering them at 7 a. m. September 5th, after an intervening holiday and a congestion at its yards, due to a threatened strike, did not breach its contract.—*Carr v. Long Island R. Co.*, N. Y., 169 N. Y. S. 569.

15. Ratification.—Delivery of shipment by carrier to buyer, if unauthorized, is ratified by shipper thereafter, with knowledge of facts, demanding payment of price from buyer, estopping

shipper to sue carrier for conversion.—*Midland Linseed Co. v. American Liquid Fireproofing Co.*, Iowa, 166 N. W. 573.

16. **Carriers of Passengers—Licensee.**—One at railway passenger station in good faith, waiting for her son, time of his arrival on defendant's train not being fixed, was not mere licensee, and defendant owed her the duty of constructing and maintaining premises in reasonably safe condition.—*Himstreet v. Chicago & N. W. Ry. Co.*, Wis., 166 N. W. 665.

17. **Charities—Liability for Servant's Acts.**—A hospital chartered in Pennsylvania as a charitable corporation is not liable for negligent and unauthorized act of nurse in administering poison to patient, where there was no negligence on part of executive officers.—*Paterlini v. Memorial Hospital Ass'n of Monongahela City*, Pa., U. S. C. C. A., 247 Fed. 639.

18. **Commerce—Interstate Employe.**—A servant, employed to provide coal and water for locomotives and to aid in moving them about the yards while on their way from Ohio to Michigan or from Michigan to Ohio, held employed in interstate commerce.—*Guy v. Cincinnati Northern R. Co.*, Mich., 166 N. W. 667.

19. **Interstate Employe.**—Plaintiff employee in bridge gang, injured while unloading defendant railway's bridge piling from car which had been switched from one to another of defendant's tracks within its yards, held not engaged in "interstate commerce" within federal Employers' Liability Act.—*Southern Ry. Co. v. Maxwell*, Miss., 77 So. 905.

20. **Common Carriers—Gratuitous Service.**—A person inviting another to ride in his automobile gratuitously was not bound to convey her safely as a "common carrier."—*Avery v. Thompson*, Me., 103 Atl. 4.

21. **Constitutional Law—Public Contracts.**—Laws 1916, c. 135, § 1, prohibiting board of public contracts from accepting bids for public printing by persons not bona fide residents of and actually engaged in the printing business within the state, does not violate Const. U. S. Amend. 14, relating to equal protection of laws.—*Dixon-Paul Printing Co. v. Board of Public Contracts*, Miss., 77 So. 908.

22. **Suicide.**—Rev. St. Mo. § 6945, declaring that, in all suits upon life policies issued by company doing business in state to citizen of state, it shall be no defense that insured committed suicide unless he contemplated suicide when he applied, held not invalid, as abridging privileges or immunities of citizens of United States, though restricted to Missouri citizens.—*Wheeler v. Business Men's Acc. Ass'n of America*, U. S. D. C., 247 Fed. 677.

23. **Contracts—Architects.**—In action against architect for failure to properly inspect and condemn defective construction, the contract and architect's testimony as to what he did held to justify the denial of a non-suit, since it was defendant's duty, not only to inspect, but to reject improper materials.—*Avent v. Proffitt*, S. C., 95 S. E. 134.

24. **Evidence.**—Writing on back of photographs submitted for defendant's prize exhibition and acceptance and use thereof, in absence of evidence that defendants' attention was called to indorsements, held not to constitute a

contract to pay the valuation indorsed on the photographs in case of failure to return them.—*Aland v. Cluett, Peabody & Co.*, Pa., 103 Atl. 60.

25. **Corporations—Conveyance.**—Provision in Pub. Act. Mich. 1897, No. 230, § 14, that stock of corporation owning and conveying land should be personal property, held not to show that conveyance of land did not carry legal title to grantee.—*In re Berry*, U. S. D. C., 247 Fed. 700.

26. **Meetings for Elections.**—Where articles of incorporation and by-laws authorized board of directors on first Tuesday in February of every second year to elect officers specified, directors who were empowered to change by-laws could postpone meeting for election of officers.—*Barker v. National Life Ass'n*, Iowa, 166 N. W. 597.

27. **Receiver.**—A court of equity may appoint receiver for private corporation discharging public functions to act as caretaker of its assets and allow corporation to gather its resources to discharge obligations and continue operation.—*Scattergood v. American Pipe & Const. Co.*, U. S. D. C., 247 Fed. 712.

28. **Sole Stockholder.**—The mere fact that deceased was president and sole stockholder of an insolvent corporation, whose affairs had been not render his purchase of its assets as the turned over to the control of its creditors, did highest bidder at an auction sale, a fraud upon the creditors.—*McMullin v. Westinghouse's Estate*, Pa., 103 Atl. 57.

29. **Damages—Computation.**—In assessing damages on account of delay, held that, though no extension of time had been allowed by owner's engineers as provided for in contract, yet, as it appeared that such extension would have been granted, damages for contractors' delay must be computed on theory that contractor was entitled to extension.—*Firestone Tire & Rubber Co. v. Riverside Bridge Co.*, U. S. C. C. A., 247 Fed. 625.

30. **Deeds—Conditional Fee.**—Deed to woman "and to the heirs of her body," to have and to hold during her life, at her death "to go equally to her children, should she leave any," and in case she died leaving no child or children, to go to her legal heirs, created conditional fee, and not life estate with remainder to her children.—*Branyan v. Tribble*, S. C., 95 S. E. 137.

31. **Estate in Land.**—Written instrument assigning and dividing six separate tracts among maker's six children, and warranting their title against any claim by the father's representatives or heirs, held not a conveyance of any estate in land.—*Dantzler v. Riley*, S. C., 95 S. E. 132.

32. **Habendum Clause.**—Deed granting lands to plaintiff as trustee, the habendum clause of which was to the trustee, his successors, or assigns, and granting other rights to the trustee and those for whom he holds title, "and his or their assigns," created a power in the trustee to sell.—*Crawford v. El Paso Land Improvement Co.*, Tex., 201 S. W. 233.

33. **Intention.**—Though words in deeds "on this condition," and in provision relating to forfeiture in case of failure to pay when demanded, are words ordinarily used to create a condition, breach of which will result in forfeiture, such will not be effect if contrary intention is manifested in deeds as whole.—*Amory v. Trustees of Amherst College*, Mass., 118 N. E. 933.

34. Divorce—Soliciting Return.—Where husband had repeatedly asked wife to go back and live with him, and her expressions and conduct indicated that further efforts to induce her to return would be unavailing, husband held excused from making further efforts.—*McCauley v. McCauley*, N. J., 103 Atl. 20.

35. Equity—Demurrer.—Motion to dismiss decree appointing receiver rendered on bill praying appointment is essentially a demurrer, and court cannot go beyond facts pleaded.—*Scattergood v. American Pipe & Const. Co.*, U. S. D. C., 247 Fed. 712.

36.—Fraud.—One whose business enterprise is based upon deliberate fraud will not find a court of equity as strenuous to preserve all his rights as he might have, if his conduct and motives had been honest.—*Peninsular Chemical Co. v. Levinson*, U. S. C. C. A., 247 Fed. 658.

37.—Evidence.—Where defendant counter-claimed on account of plaintiff's fraud in inserting in conveyance agreement to assume payment of mortgage, defendant must establish fraud by clear and satisfactory preponderance of evidence, though no reformation of instrument is asked.—*De Groot v. Veldboom*, Wis., 166 N. W. 662.

38.—Tender.—Defendant could not destroy plaintiff's cause of action predicated on fraud committed by the defendant by misrepresenting his title in the sale of the property by tendering, after the right of action had accrued, a complete title to the property.—*Berry v. Woody*, Ala., 77 So. 942.

39. Frauds, Statute of—Assumption of Debt.—Where partner buying interest of another agreed that new firm would assume the old firm's obligations and the other continuing partner signed the contract as a witness, this satisfied the statute of frauds, Civ. Code, § 1238, subd. 2.—*Jansen v. McNamara*, S. D., 166 N. W. 630.

40. Gaming—Gaming Device.—Assortment of goods including punch board for distribution which purchaser of collar button worth five cents for ten cents was entitled to punch, and which entitled him to premium if number on slip punched corresponded with number placed opposite any premium, was a "gambling device" within statute.—*Grove Mfg. Co. v. Jacobs*, Me., 103 Atl. 14.

41. Highways—Proximate Cause.—In action for injuries from collision between motorcycle and automobile, plaintiff cannot recover, when his willfulness contributed as proximate cause, to his own injury, even though defendant was willful.—*Spillers v. Griffin*, S. C., 95 S. E. 133.

42. Indictment and Information—Demurrer.—Under the approved practice in the courts of the United States, questions which can as well and better be raised at the trial should not be raised by demurrer, especially in view of Rev. St. § 1025 (Comp. St. 1916, § 1691).—*United States v. Werner*, U. S. D. C., 247 Fed. 708.

43. Injunction—Contempt.—Where, at suit of waterworks company in federal court, municipality was temporarily restrained from supplying water to inhabitants, and it enacted ordinance vacating franchise of waterworks company and began suit in state court, held, that officials and attorneys participating in enact-

ment of ordinance should not be adjudged guilty of contempt in violating spirit of order.—*Shuler v. Raton Waterworks Co.*, U. S. D. C., 247 Fed. 634.

44. Innkeeper—Negligence.—That hotelkeeper knew that entrance steps and platform were covered with freezing snow and slush, and did not clear them within 3½ hours after snow stopped falling, and allowed a departing guest to use them in that condition, justified finding of his negligence.—*Cooper v. Reinhardt*, N. J., 103 Atl. 24.

45. Insurance—Insurable Interest.—A mortgagor who has sold the premises being still liable for mortgage debt has an insurable interest in the property.—*Lumbermen's Nat. Bank of Menominee*, Mich., v. Corrigan, Wis., 166 N. W. 650.

46.—Place of Contract—Insurance policy issued by Missouri company to resident of California and accepted by him in that state held California contract, so that reliance might be had under California laws on stipulation against liability in case of death by suicide, though such defense was not available under laws of Missouri.—*Wheeler v. Business Men's Acc. Ass'n of America*, U. S. D. C., 247 Fed. 677.

47.—Relief Association.—Under constitution of firemen's relief association, fireman, who, while exercising horses, was thrown from wagon and had shoulder dislocated, resulting in permanent injury disqualifying him as fireman or to work at manual labor, for which alone he was competent, held entitled to benefits from association.—*Clarence v. Providence Permanent Firemen's Relief Ass'n*, R. I., 103 Atl. 1.

48. Landlord and Tenant—Abandonment.—Option to purchase contained in lease is not abrogated by parties making purchase agreement containing different terms of payment which they later abandoned by mutual consent, and continued to pay and receive rentals under the lease.—*Thommen v. Smith*, N. J., 103 Atl. 25.

49.—Priority.—Wife of tenant's lodger held not in such privity with tenant that stipulation in lease as to repairs by tenant would apply to lodger's wife and preclude her recovery from landlord under Civ. Code La. art. 2322, for collapse of a gallery railing.—*Hero v. Hankins*, U. S. C. C. A., 247 Fed. 664.

50. Limitation of Actions—Federal Employers' Liability Act.—In action under federal Employers' Liability Act, where petition was filed and summons served within two years from injury, action was not barred, although more than two years had elapsed between injury and date of amendment of summons.—*Martinson v. Chicago, B. & Q. R. Co.*, Neb., 166 N. W. 624.

51. Marriage—Evidence.—In action for husband's death, where defendant alleged that plaintiff was not deceased's lawful wife, it was error to admit in evidence marriage of man of similar name and the divorce decree rendered after the alleged marriage of plaintiff and deceased, without evidence deceased was the defendant in divorce suit.—*Allen v. McIntosh Lumber Co.* Miss., 77 So. 909.

52. Master and Servant—Accidental Injury.—Where collector for brewery was intentionally shot and killed for purpose of robbing him of company money, there was "accidental injury."

within Workmen's Compensation Law, § 29.—*Spang v. Broadway Brewing & Malting Co.*, N. Y., 169 N. Y. S. 574.

53.—Compensation.—Where widow of deceased servant obtains compensation for his death, decree should contain clause stating in express terms effect of act that weekly payment is to cease upon death of dependent before expiration of period of payment.—*In re Derinza*, Mass., 118 N. E. 942.

54.—Defective Appliances.—Hammer and cleaver being tools furnished by employer for use of its employee in its business, are a part of its "plant," within Code 1907, § 3910, subd. 1, making employer liable for injury to employee from defect in condition thereof.—*Sloss-Sheffield Steel & Iron Co. v. Hopson*, Ala., 77 So. 920.

55.—Dependency.—Under Workmen's Compensation Act, if award for death of servant is to be made to both parents, relative extent of dependency individually must be found, and award to them jointly is improper.—*In re Pagnoni*, Mass., 118 N. E. 948.

56.—Dependency.—Where a girl had lived over 15 years with grandparents, continuously since a few days old, her parents, in separating, having given her to them by written agreement, she was entitled, as dependent on her grandfather, to be compensated under the Workmen's Compensation Act for his death.—*In re People*, N. Y., 169 N. Y. S. 584.

57.—Employers' Liability Act.—Employers' Liability Act of 1911 does not authorize a recovery for injuries sustained by servant without negligence of master or his agents, and such negligence still remains essence of liability.—*J. Wooley Coal Co. v. Tevault*, Ind., 118 N. E. 921.

58.—Friendly Aliens.—Aliens who are residents of friendly nations and who are dependents and otherwise within terms of Workmen's Compensation Act, are not barred from compensation.—*In re Derinza*, Mass., 118 N. E. 942.

59.—Hazardous Employment.—Collector for a brewery, killed in saloon away from plant, was within protection of Workmen's Compensation, § 3, subd. 4, as amended by Laws 1916, c. 622, as to hazardous employment.—*Spang v. Broadway Brewing & Malting Co.*, N. Y., 169 N. Y. S. 574.

60.—Permanent Loss.—Under the Employers' Liability Acts (Rev. St. 1913, § 3662, subd. 3), fixing the compensation for loss of a leg, and providing that permanent loss or use of leg shall be equivalent to loss of leg, compensation for permanent loss of use of leg, unaccompanied by other physical injury or loss of health, cannot exceed fixed amount.—*Hull v. United States Fidelity & Guaranty Co.* of Baltimore, Md., Neb., 166 N. W. 628.

61.—Respondeat Superior.—Restaurant foreman employed to maintain order among waiters and employees and authorized to discharge an employee, is not necessarily authorized to inflict corporal punishment or personal violence, and master will not be liable therefor without evidence that he has directed or authorized it.—*Allertz v. Hankins*, Neb., 166 N. W. 608.

62.—Volunteer.—Teamster in employ of cotton mills company, having no duties in company's ginhouse, was not entitled to recover from the company for injuries received there while, as a volunteer, he was assisting a fellow servant.—*Melton v. Cohanett Mills*, S. C., 95 S. E. 135.

63.—Workmen's Compensation Act.—Wife who remained in Armenia while husband came to America and worked here continuously until death was not living with husband at his death within Workmen's Compensation Act, and was not conclusively presumed to be totally dependent, but dependency must be determined under part 2, § 7.—*In re Mooradian*, Mass., 118 N. E. 951.

64. **Mortgages**.—Multiplicity of Suits.—Upon mortgage foreclosure, where both mortgagor and his purchaser had taken out insurance on the property, intending losses to be payable to the mortgagee, and loss occurred, it was proper under the Code to interplead the insurance companies as defendants to avoid multiplicity of suits.—*Lumbermen's Nat. Bank of Menominee*, Mich., v. Corrigan, Wis., 166 N. W. 650.

65.—Surrender Clause.—Mortgage clause, that mortgagor should hold premises until de-

sault in payment, did not imply agreement to surrender after default, which warranted appointment of receiver upon mortgagee's application, in absence of pledge of rents and profits.—*Josey v. Smith*, S. C., 95 S. E. 133.

66. **Municipal Corporations**.—Evidence.—In action for injuries in automobile collision, where defendants alleged the car involved was not theirs, and that they were present in their office, and a witness said he was in their office and received a check at the time of the accident, the check was admissible.—*Figueroa v. Madero*, Tex., 201 S. W. 271.

67.—Extension of Boundaries.—Where a city, in ignorance of the fact that territory described was included within the boundaries of an incorporated town, extended its boundaries so as to include such territory and the incorporated town was later dissolved and thereafter the city again extended its boundaries, the city was not liable for the debts of the town.—*Fabric Fire Hose Co. v. City of Vicksburg*, Miss., 77 So. 911.

68.—Unguarded Sidewalk.—Where a lot owner constructed a sidewalk, leaving an unguarded hole to light his basement for 21 days, the city must be held to have notice of such defective condition.—*Gellenbeck v. City of Mobridge*, S. D., 166 N. W. 631.

69. **Negligence**.—Dangerous Position.—While person cannot justify his remaining in dangerous position to save property, yet he should not abandon property to injury on ground of self-preservation, until it appears that it is reasonably necessary to avoid receiving injuries.—*Brien v. Detroit United Ry.*, U. S. D. C., 247 Fed. 693.

70.—Gratuitous service.—Where steel company without charge and for accommodation of family and relatives of deceased employee had its engine and flat car, used exclusively in its business, carry remains, members of family, and relatives to and from cemetery, plaintiff, who without invitation or request, got on car and made return trip, held not entitled to recover for injuries sustained while getting off car.—*Laxton v. Wisconsin Steel Co.*, Ky., 201 S. W. 15.

71.—Invitee.—One inviting another to take a ride in his automobile held required to exercise the degree of care and caution which is reasonable and proper, and not to expose her to unnecessary peril.—*Avery v. Thompson*, Me., 103 Atl. 4.

72.—Intervening Cause.—Where a paving company maintained an asphalt boiler, with a faucet for withdrawing the substance, and at some distance therefrom a sand pile, upon which children played, and an infant in going to the sand pile was burned when the faucet loosened and fell out, the falling out of the faucet was a proximate intervening cause unforeseen.—*Sexton v. Noll Const. Co.*, Miss., 95 S. E. 129.

73.—**Res Ipsa Loquitur**.—Where ice box lid fell on customer's hand in defendant's store, doctrine of *res ipsa loquitur* raised presumption of defendant's negligence.—*Higgins v. Goerke-Kirch Co.*, N. J., 103 Atl. 37.

74. **Principal and Agent**.—Evidence.—That an alleged agent solicited freight and talked about claim adjustments is not proof of authority to receive notice of claims against railroad, in absence of proof of authorization.—*Midland Linseed Co. v. American Liquid Fireproofing Co.*, Iowa, 166 N. W. 573.

75.—Power of Attorney.—One having power of attorney from mortgagee giving right to act generally in settlement of all claims against named company and more particularly to payment of certain mortgage notes secured by mortgage on launch, although he could foreclose mortgage and take possession of launch, had no power, after having purchased launch at foreclosure sale, to sell it.—*Larson v. Hodge*, Wash., 171 Pac. 251.

76. **Railroads**.—Contributory Negligence.—Where motor car which deceased was driving became stalled on defendant's track at a crossing, and his companion alighted to crank car, deceased cannot, though he remained in car for a short time after seeing defendant's interurban car approaching, be deemed guilty of contributory negligence because his choice proved un-

wise.—*Brien v. Detroit United Ry.*, U. S. D. C., 247 Fed. 693.

77.—**Crossing.**—Railroad company held no more bound to keep tracks, crossings, and premises safe for infants than for adults, unless by course of conduct it establishes a status for children imposing greater care.—*Louisville & N. R. Co. v. Steele*, Ky., 201 S. W. 43.

78.—**Crossing Accident.**—In action for injury from collision of automobile and train at crossing, railroad's liability may rest on its negligence in allowing weeds and brush to grow on its right of way so as to obstruct vision of those in automobile approaching the crossing.—*Burzio v. Joplin & P. Ry. Co.*, Kan., 171 Pac. 351.

79.—**Guarding Crossing.**—Where tracks of railroad within populous city have been used as a road for ordinary travel to extent that it is likely that there are persons upon track, duty arises to keep a lookout and guard against wantonly or willfully inflicting death or injury on any one, including trespasser.—*Louisville & N. R. Co. v. Ganter*, Ala., 77 So. 917.

80.—**Look and Listen.**—Where vehicle driver injured by locomotive at grade crossing, testified that he stopped and looked before attempting to cross the tracks, but did not affirmatively state that he listened, whether he did was for jury, and it was error to direct a nonsuit.—*Waltosh v. Pennsylvania R. Co.*, Pa., 103 Atl. 55.

81.—**Ordinary Care.**—Where motorman in charge of interurban car either sees or by reasonable care should see that traveler rightfully on crossing cannot or apparently will not remove himself therefrom in time to avoid being struck, and motorman fails to stop his car, although able by ordinary care so to do, and thereby injures traveler, motorman is guilty of negligence.—*Brien v. Detroit United Ry.*, U. S. D. C., 247 Fed. 693.

82. **Receivers—Priority.**—Holders of certificates issued by receiver of insolvent corporation to obtain funds to pay taxes, etc., to prevent forfeiture of leasehold in valuable realty, held not entitled to any priority over claims of lessors for rent subsequently accruing.—*Ball v. Improved Property Holding Co. of New York*, U. S. C. C. A., 247 Fed. 645.

83. **Removal of Causes—Separable Controversy.**—Where declaration in action in state court, in which resident and non-resident were joined as defendants, states cause of action, there is no separable controversy which non-resident can remove to federal court.—*Baker v. Jacksonville Traction Co.*, U. S. D. C., 247 Fed. 718.

84. **Sales—Breach of Contract.**—For breach by vendee, damages are measured by difference between agreed and market price at time of breach, with interest, at place of delivery, or if goods are to be specially manufactured, and have not yet been manufactured, difference between contract price and cost of production.—*Jebelis & Colias Confectionery Co. v. Crandall-Pettee Co.*, Ala., 77 So. 932.

85.—**Future Shipment.**—Buyer of grain for future shipment may refuse to recognize seller's cancellation of executory contract, wait until expiration of shipping period, and then purchase in open market and recover difference between contract price and market price paid at stipulated time and place of delivery.—*Fahey v. Updike Elevator Co.*, Neb., 166 N. W. 622.

86. **Street Railroads—Contributory Negligence.**—Where plaintiff's truck driver, though ignorant of tracks on street which he approached at right angles, could have seen car before collision was imminent, and could have seen poles and wires, verdict was properly directed for railway.—*Beaver Valley Milling Co. v. Interurban Ry. Co.*, Iowa, 166 N. W. 565.

87.—**Contributory Negligence.**—Driver of auto, struck by slowly moving street car, having deliberately turned to cross track, when he could for some time have seen car, was contributorily negligent.—*Yetter v. Cedar Rapids & M. C. Ry. Co.*, Iowa, 166 N. W. 592.

88. **Telegraphs and Telephones—Mistake in Transmission.**—Telegraph company is agent of sender, who is bound contractually to sendee by any mistake in transmission, though sendee, under proper circumstances, may maintain action against telegraph company for damages.—Des-

Arc Oil Mill v. Western Union Telegraph Co., Ark., 201 S. W. 273.

89.—**Rates.**—Where a Pacific cable company with terminus in San Francisco had as its chief customers two telegraph companies, its requirement of one telegraph company that to its messages there be added the words "via San Francisco" and the date of acceptance, to be paid for at the regular toll rates, was unreasonable.—*Western Union Telegraph Co. v. Commercial Pac. Cable Co.*, Cal., 171 Pac. 317.

90. **Trusts—Laches.**—The failure of a complainant to bring a suit to enforce a trust within the time limited by the state statute of limitations held to bar him of relief in a federal court of equity.—*Benedict v. City of New York*, U. S. C. C. A., 247 Fed. 758.

91.—**Perpetuities.**—Where two deeds created valid trust for benefit of college, and trust for benefit of grantor and descendants named was invalid under rule against perpetuities, trust in favor of college will be supported, though trust for grantor and representatives fails.—*Amory v. Trustees of Amherst College*, Mass., 118 N. E. 933.

92. **Vendor and Purchaser—Fraud.**—Where lands were sold for orchard purposes under agreement that vendor would plant and cultivate them for five years, representations of vendor held, if false, to be fraud within Rev. Codes, § 1978, defining actual fraud.—*Como Orchard Land Co. v. Markham*, Mont., 171 Pac. 274.

93. **War—Trading with Enemy.**—Act Oct. 6, 1917, defining, regulating, and punishing trading with enemy, must be construed in light of purposes, first, to prevent act resulting in detriment to United States in war, and, second, not to permit or compel act resulting in injury to individual alien enemy without benefit to United States.—*Keppelman v. Keppelman*, N. J., 103 Atl. 27.

94. **Waters and Water Courses—Agency.**—That companies carrying water by canals from reservoir of irrigation company were agents of irrigation company and not of its customers was not established by fact that some officers of irrigation company and carrying companies were the same, or that irrigation company occasionally allowed employee of carrying company to turn water into extension ditches.—*Hood v. Burlington Ditch, Reservoir & Land Co.*, Colo., 171 Pac. 371.

95.—**Enforcing Rates.**—Water company has right to enforce payment of water bill by shutting off water, but if bill is not just, it is liable for damages.—*Birmingham Waterworks Co. v. Davis*, Ala., 77 So. 927.

96. **Wills—Annulment.**—In will reading, "To P. I leave all I die possessed of," erasure at place where word "die" was written held not important or cause for annulling the will, under Rev. Civ. Code, art. 1589.—*Succession of Walker, La.*, 77 So. 889.

97.—**Children.**—Granddaughter of testator, whose mother died before him and who was not named in a will, held not entitled to take under provisions that issue of children dying in his lifetime should take share which deceased child would have taken, etc.; provision referring to gifts to named children.—*Holloway v. Collee*, U. S. D. C., 247 Fed. 599.

98.—**Construction.**—Under will providing that if devisees died while their children were under age their children should have rents and profits until they attained majority, and if they died before that time estate should revert, grandchildren held to take only rents and profits until they attained majority when their estates terminated.—*Morgan v. Staton*, Ky., 201 S. W. 304.

99.—**Remainder.**—In bequest to child for life with remainder to her "heirs," but, if she died without "heirs," remainder to go to testator's brothers and sisters, word "heirs" means children, and is a word of purchase and not of limitation.—*Walden v. Smith*, Ky., 201 S. W. 302.

100. **Witnesses—Wife.**—In prosecution for violation of Mann Act, where it was charged that accused feloniously induced his wife to go from one place to another in interstate commerce for purpose of prostitution, wife is competent witness.—*Denning v. United States*, U. S. C. C. A., 247 Fed. 463.

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FRANCHISE GRANTED BY MUNICIPALITY TO A PUBLIC SERVICE COMPANY AS BEING CONTRACTUAL IN NATURE.

A recent decision by the Missouri Public Service Commission deals with the question of the power of that Commission to increase fares allowed to be charged by a street railway company of St. Louis beyond those specified in a franchise granted by municipal ordinance, under the Missouri Constitution. St. Louis was empowered to require as a condition of its consent to the use of its streets, that a public service company should agree to charge rates specified by ordinance. By a majority of three to two the commission held that there was no surrender of the State's power of regulation by the Constitutional grant of power to the municipality. *Re United States Railways Co.*, P. U. R. 1918, B. 815.

This question, in its last analysis, is governed by the Federal Constitution and by the clause particularly relating to the impairment of the obligation of contracts. In many cases by the Supreme Court it has been held, especially where there is question of the surrender of the State's right to regulate public service companies, that there is no conclusive right of contract that may not be impaired where ordinances of a city condition rights in the use of its streets by a public service company, unless the legislature or the state constitution clearly authorizes such as a contractual right. *Collier on Public Service Companies*, pages 178 to 181, 512, 601.

In a very recent case by U. S. Supreme Court it was said: "Assuming (what is not clear) that the provision in the franchise ordinances respecting the rates of fare and the transfer privilege is contrac-

tual in form, still it is well settled that a municipality cannot, by a contract of this nature, foreclose the exercise of police power of the State, unless clearly authorized to do so by the supreme legislative power." *Puget Sound Traction, L. & P. Co. v. Reynolds*, 244 U. S. 574, 37 Sup. Ct. 705, 61 L. Ed. 1825, P. U. R. 1917, F. 57.

This class of holdings have all been made on a theory independent of any reservations in constitutions as to the right of alteration of charters to corporations, to exclude which it has been ruled there must be "such clear and unmistakable language, that it cannot be reasonably construed consistently with the reservation of the power of the State." *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174; *Sutton v. New Jersey*, 244 U. S. 258. *Collier on Public Service Companies*, § 90.

In *Puget Sound Traction* case a city ordinance provided for a rate by a street railway not exceeding 5 cents with transfers and for commutation tickets at 4 cents. It also provided for reasonable rules and regulations, except that these must not be in "conflict with the laws of the State of Washington and the charter and ordinances of the city." There was no express condition stated regarding the railway charging fares.

The opinion referred to the view of Washington Supreme Court that "contractual provisions in franchises conferred by municipal corporations without express legislative authority are subject to be set aside by the exercise of the sovereign power of the State," and it approved that view. The opinion also distinguished this ruling from the case of *Detroit United R. Co. v. Michigan*, 242 U. S. 238, "where the State legislature had expressly provided that the municipal corporation might make a binding agreement with a street railway respecting the rates of fare."

Looking at the facts in this case it is to be observed that the court said that original village and township grants were contractual in their nature, and recipients of such grants and their successors were in-

corporated under a street railway act, which provided that no consent for the construction of a railway could be given "until the company shall have accepted in writing the terms and conditions upon which it is permitted to use the streets."

Further it was provided that no consent previously given shall "be revoked or the company deprived of the rights and privileges conferred." Also it was provided that "the rates of toll or fare to be charged by the company are to be established by agreement between it and the corporate authorities and are not to be increased without consent of such authorities."

After referring to *Detroit v. Detroit Citizens Street R. Co.*, 184 U. S. 368, it was said it was there pointed out "that the legislature regarded the fixing of the rate of fare as a subject for agreement between the municipality and the company. And the terms of the several ordinances are such as clearly to import a purpose to contract under the legislative authority thus conferred."

In the principal case the minority of the Commission rely upon a provision of Missouri Constitution which reads that: "No law shall be passed by the general assembly granting the right to construct and operate a street railroad within any city, town or village or on any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad, and the franchise so granted shall not be transferred without similar assent first obtained." Mo. Const., Art. 12, § 20.

Does such a constitutional provision imply a legislative grant to a city, town, village, or other local authority to exact of a street railway contractual arrangements in regard to what it shall charge for its service to the public? On the other hand, such provision might be construed to mean, that, regarding a street railway as an obstruction to travel on streets or highways

and local authorities being bound to keep them free from obstruction, the question whether under existing conditions obstruction should or not be permitted, is left to the judgment of the local authorities. If this satisfies the purpose of the provision, then there is no grant to the local authorities of contractual rights, and according to the U. S. Supreme Court there must be a clearly authorized grant of contractual power or the grant fails in this regard.

The all-wide vesting of the right of consent—not in a particular city or village, but, generally, in local authorities—seems far from conferring contractual power. It rather seems the conferring on local tribunals the right of veto against obstruction of highways over which they have superintendence. And it seems to us that, if this power of superintendence were not exercised in sound discretion its findings could be set aside by some appropriate tribunal.

We do not treat this question according to any rulings in Missouri courts, because, as said, the question is one rather of federal law in respect to impairment of obligation of contracts. As said by U. S. Supreme Court in *Detroit U. R. v. Michigan* *supra* that "notwithstanding our disposition to lean towards concurrence with the view of the State court of last resort in a matter of this nature, we are unable to accept its construction of the ordinances of 1889." There the judgment was reversed and the ordinances were held contractual in their nature, but the principle is the same. We think that State law in that case very clearly provided for contractual arrangements, but it seems otherwise so far as the Missouri Constitution is concerned.

It may be said, in conclusion, that the purpose in chartering public service companies is to serve the public and it ought to require specific grant of authority for a subordinate department in a State to interfere with them, or even with the general public's rights to demand service from

an unincorporated public utility upon reasonable request and for reasonable compensation. These subordinate departments themselves only operate under plainly conferred powers.

presumption cannot be indulged. The principle referred to by the majority does not need for its operation that another should have the benefit it confers.

NOTES OF IMPORTANT DECISIONS.

DECEIT—ACTION AGAINST FATHER FOR MISREPRESENTING AGE OF MINOR CHILD.—In *Stryk v. Munchowicz*, 167 N. W. 246, decided by Wisconsin Supreme Court, it was held, by a majority, that the rule that a minor, suffering injury while engaged in an employment forbidden by law to be engaged in, cannot be barred of recovery or subjected to any counter-claim for damages, by any misrepresentation as to his age, does not apply to a father or other third person misrepresenting the employe's age, the employment being made in reliance on such misrepresentation.

The rule regarding misrepresentation by the minor was held to be, that public policy forbids the minor from dispensing with the statute, but this does not operate in favor of the father of the child.

A dissent by two judges is, that the rule as established is devitalized—its potency, in effect, taken away—by permitting action against the father of the child for loss recovered by the latter, by the employer relying on misrepresentation by the father as to the age of the child.

The majority proceeded on the theory that a right of action arises out of misrepresentation relied on by one to his injury, though the misrepresentation causes the one relying thereon to commit a criminal act merely *malum prohibitum*, in this case the employment of a minor of non-employable age.

The dissenting opinion contends, that if public policy is invaded by allowing an employer to plead in bar or by counterclaim against the minor himself, so also should such policy prevent employer from doing, in effect, these things against the minor's parent, who controls the minor in the bringing or not bringing of his action. While it may be true that the minor practically might be thus barred of his right, yet this is only an incidental and not a direct effect, and it presumes that because the parent injures an employer, by this token he also would injure his child. This

CORPORATIONS—LIABILITY OF DIRECTOR FOR NEGLECT OF DUTY.—In *Kavanaugh v. Gould*, et al., 119 N. E. 237, decided by New York Court of Appeals, it was held that where a director was chosen upon an arrangement that he was not to attend meetings nor to take any active part in the management of the affairs of a trust company, it, nevertheless, is a question of fact whether losses from mismanagement by its active officers is attributable to the non-performance of their statutory duties and they be held liable therefor to stockholders.

As a fact the defendant Gould never attended the meetings of directors, nor acquainted himself with the business or methods of the company. The opinion shows gross abuses in the making of loans without adequate security, sometimes by resolution of the board, again by direction of the president, who acted without check or hindrance by the board and in matters not known to, but which ought by diligence to have been known by, such board.

It was said: "We do not say as matter of law that the defendant Gould was negligent, or that his negligence caused the above losses, but we do say that it is a question of fact, whether as a director he should have known by the July 22 meeting (at which he was not present) something of the company's affairs and the transactions and methods of its president, and whether, upon the evidence and under the conditions above stated he should have, in the exercise of reasonable care, done something to prevent the continuance of such methods and further loans on the shipbuilding bonds without a check or supervision."

These shipbuilding bonds appear to have been loaned upon by the president and kept secret, but any sort of supervision over his acts would have exposed the transaction. The loan appeared to be largely a gamble disastrous to the company. The court laid down the principle that: "No custom or practice can make a directorship a mere position of honor devoid of responsibility or cause a name to become a substitute for care and attention. The personnel of a directorate may give confidence and attract custom; it must also afford protection." The holding by the court was unanimous.

DEMOCRACY UNDER CONSTITUTIONAL LIMITATIONS.*

Our democracy is fighting a common battle with yours for the preservation of Christian civilization; our soldiers are side by side with your gallant men, with the Australians and New Zealanders, forcing back the sullen barbarians from the devastated soil of France and Belgium. Our political leaders are at one with yours in the fine determination that this war shall be fought out until the whole world is purged of German treachery, and that outlaw among nations is made to pay the penalty for its crimes.

When peace comes, we shall look out upon a changed world. Reverence for the past will have lost its force with multitudes; respect for authority has already been undermined by the continual appeals of half-educated demagogues. The danger most to be feared is that in seeking reformation for acknowledged defects in democratic institutions, our English-speaking peoples may fall in to the heresies which made of the French revolution the preparation for despotism and in our day has brought the Russian people to the brink of anarchy.

Under the awful stress of this unprecedented war the duty of the patriotic citizen is clear. With a full persuasion of the value of the checks and balances necessary for the preservation of free government, every effort must be directed towards winning the war. Failure to do so will leave us at the mercy of a ruthless power, which looks upon might as the only test of right—a power which invokes the Deity not as incarnated in the crucified Saviour, but in the war gods of the Vikings.

When the war is won, what are we to say to the vast mass of jealousy and dis-

content which has been bred in the very heart of our social system? We must recognize the fact that democracy's direst foes are in her own household. If the fair promise of the past century of effort to teach men the art of self-government is to be turned into disappointment, it will be because we are not able to educate the masses into an appreciation of the necessity of self-control and self-renunciation.

No student of English history can fail to note running through the centuries the influence of the ideal of law for the protection of the inalienable rights of the individual. Beginning with the Magna Charta in the reign of King John, it has been developed through all the struggles between arbitrary prerogative and parliamentary resistance until now the British Constitution, although unwritten, is a buttress against any form of invasion of the right to life, liberty and property. No human institution has ever been perfect, and in the sphere of political government, history seems to be one long record of failure and imperfection. But it is, as we believe, the peculiar glory of English-speaking men that they have more nearly solved the problem of insuring to the masses the great object of all law—the protection of the citizen so long as he observes the general precepts upon which it is based, summed up in the classic definition of Justinian that he should

"Live honorably, hurt nobody, and render to every one his due."

In the United States we have been taught to believe that no form of government has been developed with more prescient wisdom than that which is embodied in our national Constitution. While it seemed to be "struck off," to use Gladstone's words, by the "brain and purpose" of the gifted men who assembled in Philadelphia in 1787 to suggest to the people of the confederation of states some remedy for the obviously impossible system which endured as a makeshift until independence was secured, its genesis lay centuries back in the contests which overthrew the pretensions of the

*This very thoughtful article is a revision of an address delivered by the President of the American Bar Association before the Ontario Bar Association and is full of suggestion and hope for such a time as this when unprecedented changes are taking place in all avenues of human endeavor and are threatening even the most stable institutions of society.—A. H. R.

royal prerogatives in England. Nor need it be denied that out of the speculations of radical philosophers of the 18th century in France, some grains of wheat were separated from much pernicious chaff, to find root in the minds of the fathers of our Republic. But, unlike the dreamers and mockers who undermined the edifice of French royalty, the American statesmen were men of constructive genius, who well knew where the limitations between popular rights and popular powers should be drawn.

Without exaggeration, and making every allowance for the defects that have become apparent as the years have passed, it cannot be doubted that never has so large a body of people been gathered under any political system with an equal distribution of wealth or so high an average of morality, using the word in its widest signification. While the immigrant population in the great cities, especially in New York, has grown too rapidly to be assimilated, until recent years there has been no formidable effort to dispute the generally accepted belief among the body of American citizens that our governmental system, with its written constitutions, state and Federal, based upon the three-fold distribution of functions, the legislative, the executive and the judicial, has solved the political problem. An ultra provincial school has insisted that what has done so well in America would do equally well in other countries. But the more perspicuous thinker has recognized how much the success of our scheme of government has come from peculiar conditions that can never be repeated. The land was new and but thinly peopled by nomads. It was rich in every bounty of nature, and the early settlers were free from inherited inequalities of rank and fortune and vested interests, which must be reckoned with in ancient countries. If the theory of democracy was ever to be worked out successfully, here was the God-given opportunity. It has worked out so far. Liberty regulated by law has pervaded among a greater population and over a greater region than has

ever before been dominated by one people. The only comparison history affords is with the Roman Empire from Augustus until the barbarian invasion brought about its dismemberment. But, as we know, while peace reigned within the borders of that mighty power, liberty and self-government were dead. Nor was it until Constantine made Christianity the state religion that moral influences asserted themselves in arresting the all but universal decay of civilization. As the moral power of Christianity saved the ancient civilization from total destruction, taming the passions of its conquerors and making them accept and develop all that was good in it, so it has been due to the same power that the ideal of individual liberty has been preserved and developed in the modern world. Inadequately as modern nations have practiced the doctrines which Christians profess, they have at least assumed to follow them, and civilization has advanced just in proportion as those doctrines have been carried into effect. Rarely has a Macchiavelli or a Frederick openly advocated a frank departure from Christian principles.

A fundamental precept of Christianity is the equality of human souls in the presence of their Creator. Although the infidel philosophers of the 18th century rejected all supernatural sanction, such natural virtues as they possessed influenced their speculations to an appreciation of some of the consequences of this truth. Their advocacy of a pure democracy has merit accordingly. It is beside the purpose to show how the dreams of liberty, equality, fraternity failed of realization when tested by the grim realities of human passion, and how mankind, preferring security in fact to the illusion of liberty, took refuge in reaction. The fathers of our Republic knew how to draw wisdom from the lessons of history. The fruit of their labors was a constitution resting upon the consent of the governed, but stabilized against emotional change.

As there is nothing static in human affairs and each age presents new tests, our

American statesmen are confronted with the necessity of justifying principles which were once considered axiomatic. They reach to every aspect of governmental affairs. The common sense of justice, slowly aroused, finally acquires irresistible force. Before the stress of war, with its insistent demands for action, had aroused the people, there were symptoms of discontent demanding change and obtaining it. We have tried to cure the evils, or supposed evils, of our system, by resorting to a more popular participation in actual government. The adoption of the initiative, the referendum and the recall are especially significant. It remains to be seen whether they will be of good or evil effect. It requires but a glance at the working of government, whether Federal, state or municipal, to see that it has not been because of any limitation on the power of the electorate that the system has failed where failure has come, but because of the indifference and inertia of a great proportion of electors. No political system which presupposes the intelligent interest of an educated body of citizens can be effective if the first postulate is faulty. It is in the highest degree unfortunate that so many well-intentioned leaders of public opinion believe that legislation which is not in itself the outcome of popular habit and opinion can prove effective.

Our statute books are full of laws which are dead letters, and necessarily so, because they run counter to this principle. The present session of Congress exhibits the spectacle of a proposed amendment to the Constitution enfranchising women, which is a new evidence that both political parties are ignoring the old theory of non-interference with state concerns. While, if the prohibition amendment now pending is carried, it will be a surrender to the central government of jurisdiction in matters hitherto deemed primarily of local import, without precedent in the history of the Republic.

Perhaps it may safely be said that all forms of government are the result of evolution. We may agree with the advanced

thinkers who recognize that in and of itself there is nothing sacred in any form, save as it is an evidence of adherence to the eternal rule of order. But certainly reverence is due to the fruit of the wisdom of ages of experience, and customs hoary with antiquity are not lightly to be laid aside. Measured by events, more tests have been applied to the constitutional system of the United States in the one hundred and thirty-eight years of its existence than to that of China in a millennium. It is a matter of concern, therefore, not alone to Americans, but to all lovers of mankind, that any strongly organized body of discontented people should seek to revolutionize that system, whether the movement be traced to the self-confident superficial demagogue of an early established stock or to the imported heresies that have come with German immigrants. It is with us and must be reckoned with. It finds the most congenial soil in the minds of those who feel that injustice is done in the distribution of wealth directly produced by labor. Many are restive under the administration of a law which guarantees the right of property. Of recent years this feeling has become crystallized in opposition to the courts. Various provisions have been forced into state constitutions to curtail their power. Their right to interpret the constitutions, national and state, and to declare void legislation where it offends against constitutional limitations, has been violently assailed as usurpation. While for the moment the strenuous efforts of the legal profession have checked and restrained the agitation for a change which would result in practical revolution and destroy a judicial power unique among modern political constitutions, the popular discontent has left its traces. In Ohio, for instance, the new Constitution, Article IV, Section 11, provides that the concurrence of all but one of the judges is a requisite before any law can be declared unconstitutional, except in the affirmance of judgments of the court of appeals. In other states, the principle of judicial recall has been adopted.

That eminent publicist, David Jayne Hill, seeking an explanation for the failure, "the weakness, the disappointment, the perfect disillusionment of the Hague Conference," believes that it is to be found

"in the fact of the veto—the possibility that after many months of conference and thought and labor * * * one or two powers could disappoint the issue and prevent anything being done," and "the conspicuous reason why so many nations are reluctant to have matters of importance adjudicated by a neutral court is that there is no law on the subject, and we do not like to subject great issues to the mere private opinions or individual judgment of men; and we shall have to proceed first by laying down broad principles of a constitutional nature, which are prohibitive as well as creative of legislative powers, and then proceed to certain specific and definite acts of international legislation which we can never attain except on the principle of majorities." (Proceedings of the American Society of International Law, 1917, page 82.)

Mr. Hill is of opinion that the willingness of the American people to submit to majority rule is because it is exercised within the limits of constitutional protection. These immunities are secured as the first step in advance. He says justly:

"The problem of democracy was never solved until it was solved in this country—first in our state constitutions and then in our Federal Constitution. But this kind of democracy is fit to spread over the whole world, wherever there is a reasonable degree of intelligence, and it is the only kind of government, except some form of despotism, that can be trusted with the destinies of mankind." (*Ibid.*, page 83.)

In reply to the obvious inquiry as to the working of the British Constitution without express limitations on the power of the majority, Dr. Hill says with great force:

"There are many traditions with respect to power in the English Government, and there are conservative institutions which are characteristic of the English people and of the English character, which cannot be found anywhere else, and while

a parliamentary democracy may work very well in England * * * there is no assurance that it is capable of universal application, * * * and that is the ground of difference between this complex and highly diversified nation—the melting pot of all the nations of the earth—and a race like the insular English race or the self-governing colonists that have gone out of England." (*Ibid.*, page 84.)

A distinguished justice of your own Supreme Court, William Remick Riddell, whose recently published book on the Constitution of Canada contains a chapter giving a comparative estimate of the governmental systems of the United States and the Dominion concludes that

"The great and overshadowing difference between the United States and Canada consists in the written constitution of the former, limiting and defining legislative powers, *i. e.*, what are called constitutional limitations."

He asks:

"And does all this not show that the fathers of the Union had not confidence in the wisdom and justice of the people—the electorate? They were not content to leave to the existing or to future generations the power to act contrary to what they, these fathers, thought just and right. If it was not, 'No doubt but ye are the people and wisdom shall die with you,' was it not perilously near to it?

"The result is that the people of the United States of America are governed in part indeed by the legislators elected by themselves, but in no small measure by the hand and voice of the dead.

"This is the essence of what is so often made a boast, namely: That its government is a government of law and not of men. Wherever there is a written constitution limiting the powers of legislative and executive bodies, there must of necessity be a judicial body to interpret the meaning of the constitution; there must of necessity be a tribunal to determine the meaning of the document in case of dispute. That tribunal could not well be the legislative or the executive itself, but it must be a separate tribunal and can only be a court."

The learned justice then passes in review some of the leading constitutional decisions of the American courts and con-

trusts them with those of the Dominion courts in similar cases. All going to show that

"The government of the United States can claim no powers which are not granted by the Constitution. It is a government of enumerated powers. The Dominion of Canada has all the powers not granted to the Provinces.

"In the United States the courts are supreme. In Canada the people rule through their representatives; in the one country a few men say to the legislative bodies, 'Thus far shalt thou go and no further'; in the other the legislative bodies say to the courts, 'Thus far and thus shalt thou go and no further or otherwise.'" (The Constitution of Canada, pages 141, 145.)

The reproach leveled at the fathers of the Constitution of the United States, and those who seek to maintain it unimpaired, is a lack of confidence in the people. Is not this unjustified? The same body which created the Constitution can amend and has amended it. In the long run, all powers of government are granted by the people and may be resumed by them. A fear of emotional legislation was certainly warranted by a generation which heard the visionary teachings of Rousseau and the mocking cynicism of Voltaire. Its conservatism was justified by the orgies of the French revolution which followed within a lustrum the deliberations of the Philadelphia Convention. It is not accurate to say that

"Half a dozen men sitting up in a quiet chamber can paralyze the activity of a Senate and a House, may say that a measure imperatively called for in the public interest cannot be validly enacted; and the legislators and people are helpless."

Those half dozen men dare not, under their oaths, expound any law but that which is binding upon them as upon all branches of the government and the whole body of the citizens. Every objection which has been raised against the theory and practice of government under the Constitution of the United States would seem to have been foreseen and dealt with by the con-

vention which framed it and the gifted men who persuaded the states to adopt it.

"The interpretation of the laws," says Hamilton, "is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as a fundamental law. It, therefore, belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

"If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

The assumption that a written constitution is a dead hand laid upon coming generations by that which adopted it, and, therefore, is undemocratic, falls when it is remembered that provision always exists for change by the regular methods of amendment. If the people, in adopting such an instrument, foresaw from the history of mankind that self-imposed restrictions are of the essence of good government, both for the individual and for the nation, they would be derelict in not imposing them. Whatever be the theoretical arguments in favor of unrestricted and immediate power in the hands of the numerical majority of a comparatively small homogeneous people, the history of the United States shows that the checks and balances of a written constitution have worked well with them. With every allowance for the imperfections of which thoughtful Americans are painfully aware in their political government, especially that of municipalities, it may be safely maintained that it is not in the direction of an unrestricted democracy, but in a greater care in observing existing constitutional requirements that the remedy is to be found. While we may heartily agree with Justice Riddell in accepting the aphorism, "It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men

who administer it which count," we may not abate our admiration for the pre-science of the draftsmen of our Constitution and for their handiwork; for whatever the future may have in store for the American people, under the protection of their Federal and state constitutions, they have enjoyed hitherto a measure of rational freedom unequaled by so large a community in the history of mankind.

After all, in the vexed questions of political government, as in all other human affairs, the tree must be judged by its fruit. True it is that the goodly heritage of the American people was a virgin continent whose wealth they have exploited, but have shared with a generous hand with all who were willing to cast their lot with them. True it is that the inevitable selfishness of human nature, the decay of religious faith and the ills inseparable from prosperity have prepared the ground for the enemies of self-restricted democracy to sow the seeds of discontent and irreverence for tradition. The un-American doctrines of the schools of Marx and Lassalle and their followers have made serious progress among the immigrants in our republic, foreign in race and temper to the feelings and aspirations inherited by the American people from the motherland of the early settlers. When the open savagery of the attack which is now made upon our nation and upon all democratic nations has been defeated, we and they will have to grapple with the more dangerous conspiracies within, and especially with those directed against our constitutional system. The murmurings against the judicial power, the violence of which has been abated for the time, are but symptoms of the assault to be made all along the line against the limitations upon majority opinion.

For years we have been treated to disquisitions on the thoroughness and efficiency of the German polity. Our collegiate schools of economy and sociology have been the effective means of carrying on propaganda in favor of German meth-

ods in all departments of civic life. We have imported professors from German universities and sent our clever young men to sit at the feet of their faculties in their home land. For more than a generation the careless, wasteful administration in America has been contrasted with German efficiency, until we were ready to believe that the more our entire polity was Germanized, the nearer we should come to the ideal perfection. Since August, 1914, we have been undergoing a process of disillusionment. While the magnificent organization of the imperial army has been demonstrated, it has none the less been found possible for the hastily improvised levies of the British Empire, rallying upon the superb armies of France and Belgium and Italy, to hold in check the mighty columns that represent the study of Moltke, Bismarck and their successors during fifty years. The German sea power dares to assert itself only in the submarine method of assassination. It needs but a little time and patience to prove that, after all, the idol of German naval and military efficiency has feet of clay.

When we turn to the workings of German methods in social life, we find the falsity of the claim of superiority of the boasted kultur compared with conditions of democratic nations. Recent studies of "The League for National Unity" are of vital significance. They show how pernicious has been the effect of the German propaganda in weakening the respect and loyalty of other peoples for their own country, by spreading the fiction that the welfare of the common people is the prime consideration of the German government, while in point of fact all its legislation is based upon the theory of strengthening the ruling aristocracy, who are to all intents and purposes a feudal class. It is suggested that the belief in German benevolence towards the working classes, taught in New York to Russian exiles, has had much to do with the attitude of the Bolshevik leaders towards Germany, with its recent disastrous

results. Far from being benevolent towards the working masses, it would seem from a review of the League's tracts that Karl Liebnecht told the truth when he wrote in 1916:

"Nor does this conclusion by any means suppose the superiority of the judicial to the legislative power; it only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statute, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental." (The Federalist, No. 78.)

It appears that the feudal system still obtains in the land laws, and the peasant farmers are compelled to pay off feudal dues in addition to taxation. They must submit to stringent laws of registration, and the educational system is so devised that, generation after generation, the child is educated so that he will remain in the station of life in which he was born.

Wages are small; the greater part of the farm work is done by women. Even in peace times the agricultural population is underfed and overworked. Travelers will bear out the report of the British Board of Trade in 1908, based upon the reports of burgomasters, German boards and trade unions, that

"The German government, in its social and historical composition, is an instrument of oppression and exploitation of the working masses. It serves the interest of Junkerdom, of capitalism and of imperialism, both at home and abroad."

"In rural Germany everywhere women take their place in the field and farm yard, in the work of the forest and garden, and in any German town she may be seen drawing along the streets little carts with wood and other wares. In Bavaria, however, women work alongside of men in callings still more onerous. They act as hod-bearers; they break huge stones with heavy hammers on the site of building operations; they chop faggots in the streets for householders and carry heavy loads on wooden

racks suspended from their shoulders; and in Munich a considerable part of the work of street cleaning is done by women, who are paid two shillings apiece for a long day's exertion."

It is well said by the Committee who have prepared the notes referred to:

"The fiction is that the farmer and worker are indulgently protected by governmental schemes, such as sick insurance, old age insurance and insurance against accidents. The fact is that these very measures, which in effect do not even reach the value of poorhouse relief, are helping to drive the farmer into further indigency."

As with the farmer, so with all classes of labor. The same weary story of exploitation and oppression is told. Over-crowding, lack of sanitary and hygienic care, excessive infant mortality, all contradict the glowing accounts upon which the world has been fed for many years. After reading the statistics, we cannot resist the Committee's conclusion that Germany's social progress is a sham which has deceived her own people and bade fair to deceive the world, while in point of fact all her benevolent laws "were but so many adroit agencies to enchain the people to its Divine right militarist system."

They have been successful in fixing upon the people the habit of looking to the government for everything, while they were sacrificed for the aggrandizement of aristocracy.

With much that is undoubtedly good in recent social legislation in America patterned upon that which was first tried in Germany, notably the Workmen's Compensation Act, it may be doubted whether it is not mixed with evil. Our democratic system will be changed into a vast bureaucracy if the body of the people are led to look to the government, state and Federal, to correct the inequalities that are the necessary consequence of competition. We have gone a long way from the practice of the earlier days. The gradual transference to Federal control of the railways and other public service enterprises threatens the

principle of local self-government. While the emergency of a great war has made it necessary to put well nigh dictatorial power in the hands of the Executive branch of the government, it must be limited strictly to abnormal conditions, or we shall pass insensibly into a socialized paternalistic system—the very antithesis of real democracy.

Lawyers as a class have been accused, with much color of truth, of ultra conservatism. Too often they have opposed measures of reform threatening vested interests; but among people of English stock, and especially in the United States, their guidance has been of the utmost value to the commonwealth. They have exercised the controlling influence in our legislatures; and where their passionless methods in dealing with great questions have been disregarded, the consequences have been ill.

Nor have they failed in bringing about reform. Under the steady pressure of our professional organizations, both state and Federal, archaic methods of administering justice have gradually yielded to simplicity. The cause of uniformity in commercial law has been greatly advanced and there is a spirit of social service in the profession which is continually gaining strength. It is not by chance that our Federal Constitution, drawn at a time when our population was three millions, hemmed in between the Atlantic Ocean and the Allegheny Mountains, has served essentially unchanged as a sufficiently flexible charter of government for a hundred millions, who have made conquest of the vast empire that stretches from ocean to ocean. Under Providence, it is because the legal profession on the bench and at the bar, in the office of the country attorney, and in the halls of legislation, have applied to each social and political problem as it arose the principles of justice embodied in the English law. Of course, the artificial rules of the feudal system have required modifying legislation, and the great body of mercantile law has been adapted and absorbed.

Changes in the habits of life, brought about by scientific appliance of the hidden forces of nature, have come with a suddenness that might well have required new adjustments. And yet, in the main, the simple rules of justice between man and man and between man and the state, as outlined by the precedents of the English courts, have been adequate for our needs.

Taught by the lessons of the past, a spirit of conservatism, not blind to the necessity for gradual change where conditions require it, should always mark the attitude of our profession.

WALTER GEORGE SMITH.

Philadelphia, Pa.

CRIMINAL LAW—PLACE OF HOLDING COURT.

MELL v. STATE.

Supreme Court of Arkansas, March 11, 1918.

202 S. W. 33.

In prosecution for assault with intent to rape, it was error for the court, at the request of the prosecuting attorney, to adjourn to a hotel for the purpose of taking testimony of prosecuting witness, who was ill, and subsequently, after returning to the courthouse, to readjourn to the hotel to take testimony in rebuttal, against defendant's objection.

HART, J. C. W. Mell prosecutes this appeal to reverse a judgment of conviction against him for the crime of assault with intent to rape. His punishment was fixed by the jury at a term of three years in the state penitentiary, and the evidence adduced for the state was sufficient to warrant the verdict. On the other hand, the testimony of the defendant exonerated him from the charge.

The record shows that the prosecuting attorney at the beginning of the trial asked that the court be adjourned to a hotel situated in the town near the courthouse for the purpose of taking testimony of the prosecuting witness. This request was granted by the court against the objections of the defendant. The court and the jury over the objections of the defendant went to the hotel and took the testimony of the prosecuting witness, and then

returned to the courthouse for the purpose of conducting the trial. After the defendant had concluded his testimony, the prosecuting attorney again asked the court to adjourn to the hotel for the purpose of taking the testimony of the prosecuting witness in rebuttal. This was granted against the objection of the defendant. The prosecuting attorney made the request in each instance on the ground that the prosecuting witness was too ill to leave the hotel and come to the courthouse and give her testimony there. In several jurisdictions where the question has been raised it has been held, unless prohibited by statute, the trial court may in its discretion adjourn court to the home of a witness to take his testimony where the witness is unable to attend the trial at the courthouse. *Davis v. Commonwealth* (Ky.) 121 S. W. 429, and *Selleck v. Janesville*, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. Rep. 906. On the other hand, it has been held to be reversible error to adjourn the trial of a criminal case to the home of a witness against the objection of the defendant. *Bishop's New Criminal Procedure* (2d Ed.) vol. 2, § 1195. *Adams v. State*, 19 Tex. App. 1; *Carter v. State*, 100 Miss. 342, 56 South. 454, Ann. Cas. 1914 A, 369; *Funk v. Carroll County*, 96 Iowa, 158, 64 N. W. 768. We think the trend of our decisions is toward the latter rule. In *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54, the court said:

"The common law defines a court to be a 'place where justice is judicially administered,' and therefore to constitute a court there must be a place appointed by law for the administration of justice, and some person authorized by law to administer justice at that place, must be there for that purpose. Then, but not otherwise, there is a court, and the judicial power of the state may be there exercised by the judge or person authorized by law to hold it; and if the law prescribed no time for holding the court, the judge might lawfully hold it when, and as often, as he chose. So, likewise, if the place was left to his election, instead of being fixed and prescribed by law, he might lawfully sit in judgment, where he pleased, within the territorial limits prescribed to his jurisdiction, but in this state both the time and place of holding the terms of the circuit court in each country are prescribed by law."

The court has recognized that in cases of emergency such as the destruction of the courthouse by fire the court itself may secure other quarters in the county seat for temporary use in the administration of justice. *Hudspeth v. State*, 55 Ark. 323, 18 S. W. 183; *Lee v. State*, 56 Ark. 4, 19 S. W. 16. In the case of *Williams v. Reutzel*, 60 Ark. 155, 29 S. W. 374, it is said that the object of the rule seems to be to obtain certainty and to

prevent a failure of justice through the parties concerned or affected not knowing the place of holding court. The manifold mischiefs that might arise from permitting a court to assume a migratory character and travel from place to place in the same locality or even in the same town are manifest. It is apparent that courts are held to determine the rights of all who are properly brought before them, and that numerous cases are pending in the same court at the same time. It would detract from the majesty of the law, lessen the dignity of courts, and cause trouble and injustice to litigants if the courts should be held at any other time or place than that provided by law. It follows, therefore, that the court erred in adjourning to the hotel to take the testimony of the prosecuting witness against the objection of the defendant.

Error is assigned because the court refused to allow the defendant to introduce testimony tending to show the insanity of the mother and sister of the prosecuting witness. There was no error in the ruling of the court. It is contended that the evidence was competent on the question of the credibility of the witness. No objection was made to the mental competency of the prosecuting witness when she testified, and no question was then raised as to her mental condition. To have permitted the defendant at the trial to have introduced evidence to prove the insanity of her mother and sister would have been collateral to the issue to be tried before the jury, and that was the guilt or innocence of the defendant.

Inasmuch as the judgment must be reversed and the cause remanded for a new trial, we will declare the law applicable to the admission of evidence relating to the mental condition of the prosecuting witness. In the *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618, the court said:

"The general rule, therefore, is that a lunatic or a person affected with insanity is admissible as a witness if he have sufficient understanding to apprehend the obligation of an oath, and to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue; and whether he have that understanding is a question to be determined by the court, upon examination of the party himself, and any competent witnesses who can speak to the nature and extent of his insanity."

It is not contended by the defendant that the prosecuting witness was mentally incompetent to testify in the case. His contention was that she was subject to insane delusions at times, and it was admissible in order to affect her credibility as a witness and to ex-

plain her conduct to prove this fact by witnesses who had personal knowledge of her condition of mind or mental delusions as well as by her acts and conduct on the occasion in question. Wharton's Criminal Evidence (10th Ed.) vol. 1, § 370, A, B; Underhill on Criminal Evidence (2d Ed.) 203; 1 Wigmore on Evidence, §§ 492-497. See, also, People v. Enright, 256 Ill. 221, 99 N. E. 936, Ann. Cas. 1913E, 318, and note, and State v. Simes, 12 Idaho, 310, 85 Pac. 914, 9 Ann. Cas. 1216.

For the error indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

Note.—Adjourning Court to the Home of a Witness in Criminal Case.—The case of Selleck v. Janesville, 100 Wis. 157, 75 N. W. 975, 41 L. R. A. 563, 69 Am. St. Rep. 906, was a civil suit and the opinion was not unanimous, and it was said that the taking of testimony was somewhat similar to a view of the premises, which was thought to be within the discretion of the trial judge, and it was said: "While we may not be willing to go to the extent of some courts in upholding trials and adjudications had outside of the court house, yet the authorities are ample to support the proposition that the taking of the plaintiff's testimony in the manner indicated did not deprive the court of jurisdiction, nor nullify the judgment, but was at most an irregularity." There are several cases cited to this, one of them appearing to be a criminal case. State v. Peyton, 32 Mo. App. 522. This, however, was not in fact a criminal case but was *scire facias* on a bond for future.

In a criminal case it is said there is a constitutional guaranty that persons accused of crime are entitled to a public trial, and this implies that it is to take place in open court at a place of holding court. O'Brien v. People, 17 Colo. 561.

In Carter v. State, 100 Miss. 342, 56 So. 454, Ann. Cas. 1914 A, 369, the situation was greatly like that in the instant case, and where objection was made to the taking of testimony of a sick witness, ill at her home. It was thought to be a reversible irregularity to do this.

An Iowa civil case held, that where a place for holding court is appointed and there is a regular court house, a court loses its jurisdiction to adjourn to a private house for the purpose of a trial. It was said that: "The danger to result from permitting the court, in the trial of a cause, at the instance of a party, against the objections of the other, to leave the place provided by law for the trial and go to another place is very manifest." Funk v. Carroll County, 96 Ia. 158, 64 N. W. 768. But an elder Iowa case said it was not improper even in a criminal trial held prior to the enactment of a statute providing that "courts must be at the place provided by law" for the court, jury and counsel to adjourn to a neighboring house to receive the testimony of a witness, if the prisoner was not put to substantial inconvenience. Hampton v. U. S., Morris 489.

And in State v. Tracy, 34 N. D. 498, 158 N. W. 1069, a criminal action, it was held that to take testimony, in a rape case at a hospital, situated at the country seat where the law recognizes that

conditions may arise where the court room provided by law may prove inadequate and the court may direct other quarters at the expense of the county, and the law also permits the jury to be taken from the court room to the place where an offense has been committed so that the jury may view such place, a court may in its discretion authorize testimony of a witness to be taken elsewhere, if no prejudice is shown to have resulted.

In People v. McWeeney, 259 Ill. 161, 102 N. E. 233, an order for injunction was held void because it was entered at an "armory;" since courts are not migratory and can only exercise their functions in the places appointed by law.

In Reed v. State, 147 Ind. 41, 46 N. E. 135, it was held that, where in a case of emergency steps are taken before a special judge in a room in the court house other than the court room, this was not error, where it did not appear in the case that the court was not regularly in session, with proper notice of the place of its sitting and with full opportunity for interested persons to be present.

A question such as is here considered does not necessarily pertain to jurisdiction, and, while a public trial involves trial at some recognized place as a court, yet there is no necessary inference of harm, where a court is vested with some discretion in an emergency. C.

HUMOR OF THE LAW.

A Circuit Court Judge of Pennsylvania was systematically affronted by a lawyer, a political opponent. A friend asked him:

"Why don't you squelch the fellow? He needs it."

"Well," said the Judge, musingly, "up in my home town there's an ugly yaller dog that, whenever there is moonlight, sits on the stoop and howls until the town can't sleep, and generally keeps it up till daylight." Then he resumed his dinner. The friend in amazement inquired, "Well, what of it?"

"Well," said the Judge, slowly, "the moon keeps right on."—Christian Register.

This is a jury room secret that has come into circulation in some mysterious way:

"Look here," said one of the jurymen, after they had retired, "if I understand aright, the plaintiff doesn't ask damages for blighted affections or anything of that sort, but only wants to get back what he's spent on presents, pleasure trips and so forth."

"That is so," agreed the foreman.

"Well, then, I vote we don't give him a penny," said the other, hastily. "If all the fun he had with that girl didn't cover the amount he expended it must be his own fault. Gentlemen, I courted that girl once myself!"

WEEKLY DIGEST

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1. Adverse Possession—Emancipated Slave.—The possession of a slave holding land as the beneficiary of a trust did not become adverse on emancipation, but to make possession adverse it would have been necessary to disavow the trust, leave the place, and re-enter, claiming adverse possession.—Shaw v. Ward, N. C., 95 S. E. 164.

2. Assault and Battery—Arrest Without Warrant.—A person is not authorized to assault an officer upon his mere statement that he has a warrant for such person's arrest, and that he must consider himself under arrest, but the officer must make some physical attempt to make an unlawful arrest before such person can lawfully resist by force.—Harris v. State, Ga., 95 S. E. 268.

3. Attachment—Levy.—Although part of chattels was not physically removed, where sheriff read writ of attachment to defendants and instructed their employees that they were keeping possession for him, there was sufficient levy to create lien as against mortgagee of property described as being at different place.—Lee County Sav. Bank v. Snodgrass Bros., Iowa, 166 N. W. 680.

4. Attorney and Client—Authority of Attorney.—Even if attorney accepted principal, interest, and costs on a fl. fa. based upon judgment on a note, and agreed with maker not

to collect attorney's fees provided for therein, such agreement would raise no presumption that attorney was authorized by client to make such settlement.—Evans v. Atlantic Nat. Bank of Jacksonville, Fla., Ga., 95 S. E. 219.

5. Imputable Knowledge.—Where attorneys were employed to ascertain whether there were suits pending affecting title to certain land, information acquired by such attorneys through examining court records is imputed to client.—Bunnell v. Holmes, Col., 171 Pac. 365.

6. Bailment—Gratuitous Bailee.—A gratuitous bailee, who is sent money for a certain purpose with written instructions, must be presumed to have acquiesced and consented to the written instructions, where he did not disavow the terms under which sent.—Bradford-Kennedy Co. v. Buchanan, Wash., 171 Pac. 228.

7. Bankruptcy—Illegal Agreement.—Agreement between two creditors to bid against each other at bankruptcy sale until certain figure was reached in order to induce other bids, and, if no higher bids were received, to buy property for their joint account and divide any profits, held not invalid.—Schaap v. Robinson, Ark., 201 S. W. 292.

8. Renouncing Interest.—Where ownership of corporate stock, apart from any interest in land conveyed by corporation as appurtenant to stock, would be of no benefit to trustee in bankruptcy, and land could not be reached, trustee should renounce any interest which he might be entitled to assert against stock by virtue of contract by bankrupt and his wife for acquisition of stock and land.—In re Berry, U. S. D. C., 247 Fed. 700.

9. Banks and Banking—Negligence.—Acts of officers of bank with capital of only \$50,000 in lending \$30,000 to a canning company in which they had stock, which had a capital of \$10,000, and which continually operated at a loss, though they believed it would ultimately pay a profit, were so reckless as to constitute negligence for which they were liable to shareholders.—Magale v. Fomby, Ark., 201 S. W. 278.

10. Bills and Notes—Acceleration of Debt.—Provision in a mortgage, securing a note payable two years after date that on default in any interest the whole should become payable related alone to a foreclosure, and did not accelerate time of payment of note, and action on note after first default was prematurely brought.—Alwood v. Harrison, Okla., 171 Pac. 325.

11. Attorney Fees.—Where note provides for the payment by the maker of principal, interest, and attorney's fees, the attorney's fees are a part of the principal debt.—Evans v. Atlantic Nat. Bank of Jacksonville, Fla., Ga., 95 S. E. 219.

12. Bad Faith.—If indorsee had actual knowledge when he took note that place of payment had been changed, or knowledge of such facts that his action in taking instrument amounted to bad faith, under Rev. St. 1909, § 10026, he is not "holder in due course."—Mechanics' American Nat. Bank v. Helmbacher, Mo., 201 S. W. 383.

13. Negotiability.—Instrument signed by bank reciting deposit by one named "payable

to the order of himself," with interest at 6 per cent if left 12 months, was negotiable, the quoted words being words of negotiability.—Chandler v. Smith, Ga., 95 S. E. 223.

14.—Purchase Money.—That note stated that it was part of purchase money for a dredge, title to which was to remain in payee, would not be notice to purchaser that consideration had, or would fail, where dredge was not delivered until four months later—Harty v. Keokuk Sav. Bank, Tex., 201 S. W. 419.

15. **Brokers** — Contract.—Defendant owner was not bound to accept from plaintiff broker a customer at a price less than that stipulated, although he was at liberty to accept a less price from another customer.—Mullen v. Crawford, Iowa, 166 N. W. 694.

16.—Producing Buyer.—Where real estate agent places his principal in touch with purchaser and thereafter principal terminates agency and completes sale to such purchaser, agent may recover his commission.—Johnson v. Columbia Mortgage & Trust Co., Mo., 201 S. W. 365.

17. **Carriers of Goods**—Bill of Lading.—When bank in good faith makes advances, whether as purchaser or lender, and receives bill of lading as security, its claim upon property covered by bill of lading is good as against claim of creditors of shipper.—Painesville Nat. Bank of Painesville, Ohio, v. Hannan, Col., 171 Pac. 364.

18.—Custody of Law.—A carrier is not responsible for goods taken from its custody by valid legal process, provided it gives the owner prompt notice of the suit, so that he may have an opportunity to protect his interest.—Morgan v. Chicago & N. W. Ry. Co., Wis., 166 N. W. 777.

19. **Carriers of Live Stock**—Special Service.—That a station agent after telegraphing told a shipper that a train arriving during the night would carry his cattle did not constitute a contract for special service and a discrimination in violation of the Elkins Act.—Chicago, R. I. & P. Ry. Co. v. Stallings, Ark., 201 S. W. 294.

20. **Carriers of Passengers**—Employees.—Where attitude of railroad company towards employees riding on railroad's gasoline speeders on their private business was, at most, one of permission, it was not liable to employee so riding, injured by defect in speeder, on theory of his being passenger.—Glover v. Chicago, M. & St. P. Ry. Co., Mont., 171 Pac. 278.

21.—Misinformation.—Misinformation given by defendant railroad's agent that plaintiff's train would stop at their destination, resulting in failure of relative to meet them at nearby station when they alighted pursuant to their original plan, and then advised relative they would proceed to ultimate destination without his company, establishes no cause of action.—Hutchison v. Southern Ry. Co., S. C., 95 S. E. 181.

22.—Relation of Passenger.—Plaintiff who was injured by opening of front door of pay-as-you-enter street car while passing by such door to enter car at rear door, held not a passenger at time of injury.—Murray v. Cumberland County Power & Light Co., Me., 103 Atl. 66.

23. **Chattel Mortgages**—Bill of Sale.—Written bill of sale and contemporaneous agreement to retransfer the property on the seller's payment of the consideration were in effect a chattel mortgage and not a pledge, under which either party by agreement might have possession.—Keppler v. Kelly, Tex., 201 S. W. 447.

24.—Description of Property.—A mortgage, describing property as "live stock," including steers, cows, etc., would cover horses and mules, though not enumerated.—Lee County Sav. Bank, v. Snodgrass Bros., Iowa, 166 N. W. 680.

25. **Commerce**—Interstate Traffic.—Conductor of work train unloading ties to repair track used for interstate traffic is employed in interstate traffic under federal Employers' Liability Act, although at the time of the accident he was not engaged in distributing ties, but was returning from work in charge of such train.—Eley v. Chicago Great Western R. Co., Iowa, 166 N. W. 789.

26. **Constitutional Law**—Equal Protection.—Gen. St. Fla. 1906, § 2218, providing for the allowance of attorney's fees to plaintiff in suits to enforce mechanics' liens, held unconstitutional, as denying to defendants in such suits the equal protection of the laws.—Union Terminal Co. v. Turner Const. Co., U. S. C. C. A., 247 Fed. 727.

27.—Legislative Intent.—Where the intent of the Legislature is plain, it is immaterial that a taxation statute is unfair, where there is no claim that it is so unfairly discriminating as to be unconstitutional.—Great Western Accident Ins. Co. v. Martin, Iowa, 166 N. W. 705.

28. **Contracts**—Attorney Fees.—Where contract for sale of grain, with receipt for advancements, provided for attorney's fees but there was subsequent verbal agreement, which did not provide for attorney's fees, and receipt was satisfied by subsequent transactions between parties, holder could not recover attorney's fees, though maker still owed him money on account.—Born v. Union Elevator Co., Ind., 118 N. E. 973.

29.—Evidence.—Where party denied making contract to do specific amount of dye work, but stated that he only agreed to do best he could on account of scarcity of dye, evidence concerning amount of dye he had on hand was admissible as explanatory circumstance.—Ess-Arr Knitting Mill v. Fischer, Md., 103 Atl. 91.

30. **Corporations**—Acceptance of Stock.—Corporate stock purchased from funds of partnership to knowledge of such corporation taken in one partner's name made him "holder" under a provision that "holder" could retire stock in exchange for products of corporation, and it could not be compelled to accept such stock for products sold partnership.—National Sewer Pipe Co. v. Smith-Jaycox Lumber Co., Iowa, 166 N. W. 708.

31.—Election of Officers.—Where stock was assigned to assignee as collateral for assignor's note, assignee could surrender certificate and receive certificate in own name, on which he might vote stock at corporation elections under by-law limiting voting right to those in whose names stock stood on the books.—Hardman v. Barrow, Ga., 95 S. E. 209.

32.—Ratification.—Where person held out by a corporation as its manager employed plaintiff.

who deposited \$500 for privilege of earning commissions and as a fund to pay his wages, at \$20 per week and commissions, for 6 months to sell automobiles for the corporation, which opened an account and accepted the benefits of the contract, it ratified it, and was liable to plaintiff for the balance of the deposit, on his wrongful discharge after 11 weeks.—*Bertholf v. Fisk*, Iowa, 166 N. W. 713.

33. **Covenants—Mutual Mistake.**—Where lots not owned by grantor were included in the deed by mutual mistakes, there was no breach of covenants of warranty and seisin.—*Maxwell v. Wayne Nat. Bank*, N. C., 95 S. E. 147.

34. **Dedication—Street Plat.**—Plat presented by owner of land to common council of city, duly acknowledged, and representing strip of land named as street running east and west across owner's land, was plat of street within meaning of Burns' Ann. St. 1914, § 8900.—*Interstate Iron & Steel Co. v. City of East Chicago*, Ind., 118 N. E. 958.

35. **Deeds—Description of Land.**—Deed of land of which S. O. died possessed, lying on waters of the Little South fork of Cumberland river in W. county, containing 365 acres, was sufficiently definite to pass title.—*Foster v. Roberts*, Ky., 201 S. W. 334.

36. **Exception and Reservation.**—Where deed divided farm between owners in common, a provision that grantor should have half income from gravel in certain lots held exception, and not reservation, in view of fact that the income had previously been divided equally between owners, and that gravel deposit constituted enterprise distinct from that of farming.—*Worcester v. Smith*, Me., 103 Atl. 65.

37. **Sufficiency of Writing.**—A writing signed and sealed by the parties styled, "Memorandum of Agreement," containing the words, "It is further agreed that the said Price will convey to the said Peyton all the mining rights and privileges of his land," is not a deed of conveyance, but only an executory contract to convey.—*State v. Morris*, W. Va., 95 S. E. 197.

38. **Undivided Interest.**—Deed conveying part of a survey, and containing 640 acres more or less, being a one-half undivided interest out of the survey, held to convey an undivided one-half interest in the survey and not any specific number of acres undivided out of the survey.—*Read v. Blaine*, Tex., 201 S. W. 415.

39. **Divorce—Alimony.**—Decree for alimony is a decree not merely for payment of money, but for its payment in discharge of marital duty of maintenance, and is enforceable by attachment for contempt.—*Smith v. Smith*, W. Va., 95 S. E. 199.

40. **Increase of Alimony.**—Amount ordered to be paid as temporary alimony may be increased to meet wife's need from changed circumstances because of necessary surgical operation with its expenses.—*Rotge v. Rotge*, Colo., 171 Pac. 360.

41. **Waiver.**—A wife without means of support should not be held to waive her right to review a decree divorcing her from her husband and ordering her from his house by the forced acceptance of monthly allowances made in the decree, not appreciably larger than previous allowances pendente lite.—*Spratt v. Spratt*, Minn., 166 N. W. 769.

42. **Easements—Irrevocable License.**—General parol license by owner of dominant tenement to

obstruct easement when executed by owner of servient tenement upon his own land becomes irrevocable.—*Town of Brookline v. Loring*, Mass., 118 N. E. 981.

43. **Electricity—Public Service Company.**—Corporation furnishing electricity to consumers for lights, etc., may enforce reasonable regulations, but cannot compel customers to release it from obligation when it may elect, but must, according to their needs and its facilities, equally serve those submitting to its rules.—*Chambers v. Spruce Lighting Co.*, W. Va., 95 S. E. 192.

44. **Eminent Domain—De Facto Officer.**—Condemnation by a board of municipal park commissioners created under an unconstitutional statute cannot, when questioned in ejectment, be upheld on the ground that they were de facto officers, whose acts were not subject to collateral attack.—*Nichols v. City of Cleveland*, U. S. C. C. A., 247 Fed. 731.

45. **Procedure.**—Without adjudication and judgment of necessity to condemn, no subsequent proceeding can be had in condemnation proceedings, and judgment of necessity is final, subject only to review as provided by law.—*State v. Superior Court for Grays Harbor County*, Wash., 171 Pac. 238.

46. **Estoppel—Change of Decision.**—City held not entitled to base estoppel on expenditures made or action taken, based on rule of decision subsequently changed, where city took possession of land under invalid condemnation statute.—*Nichols v. City of Cleveland*, U. S. C. C. A., 247 Fed. 731.

47. **Exchange of Property—Rescission.**—If defendant or his agent, exchanging land for plaintiff's factory, took advantage of fact land was covered with snow when plaintiff inspected to mislead him, fact that had plaintiff been more diligent he would have discovered deception and saved himself from loss is no defense to defendant, sued for rescission.—*Thuesen v. Johnson*, Iowa, 166 N. W. 747.

48. **Executors and Administrators—Breach of Contract.**—Contract whereby son, in consideration of his parents' conveyance to him, bound "himself, his executors, and administrators and heirs" to support parents during their lives, was not breached by son's death, so as to allow parents to establish the present value of such support, based on mortality tables, as a claim against the son's estate under Rev. St. 1909, § 210, providing that when the demand is not due the court may adjust the same, etc.—*Wilbur v. Wilbur*, Mo., 201 S. W. 387.

49. **Injunction.**—Where administrator is seeking to sell property as a part of estate of his intestate, adverse holders of land may maintain a suit for injunction; there being other facts alleged to show grounds of equitable jurisdiction.—*Pickron v. Pickron*, Ga., 95 S. E. 228.

50. **Fixtures—Removability.**—Smokehouse built by lessor for tenant with money furnished by tenant as incidental to tenant's packing house business, held a "trade fixture," removable as such.—*Armour & Co. v. Block*, Ga., 95 S. E. 228.

51. **Fraud—Expression of Opinion.**—If party expressing opinion possesses superior knowledge, his statement is actionable if he knows that he does not honestly entertain opinion because it is contrary to facts.—*Como Orchard Land Co. v. Markham*, Mont., 171 Pac. 274.

52. **Homestead—Constitutional Law.**—Under Const. Ark. 1868, art. 12, § 2, a sale under a deed of trust of land including the homestead conveyed no right in the homestead, either present or in remainder.—*Hill v. Hill*, U. S. C. C. A., 247 Fed. 778.

53. **Husband and Wife—Entirety.**—Where a judgment is entered against both husband and wife who hold land by entirety the property is subject to execution, but where the lien and judgment against the husband's interest becomes void because of his bankruptcy, levy on the property cannot be made during his life.—*Ade v. Caplan*, Mo., 103 Atl. 94.

54. **Joint Accounts.**—Where a husband acted as agent for investment and management of property for a period of years, and he and his wife maintained joint accounts, wife received

benefit to her estate by settlement agreement of client who forebore to sue for accounting, or to follow joint property of husband and wife, and she was not in such case husband's surety.—*McKay v. Corwine*, Ind., 118 N. E. 978.

55. **Injunction**.—Negative Covenant.—Court of equity will infer negative covenant in contract of employment, where equity and justice require; but such covenant, to be interfered with by injunction, must be clearly implied and understood by all parties, and should not be implied unless indispensable to carry out their intention.—*Kennerly v. Simonds*, U. S. D. C., 247 Fed. 822.

56.—**Sureties on Bond**.—Sureties on bond of administratrix, sued jointly with her on distributee's judgment obtained on citation against her, might show that the judgment was obtained by collusion and fraud, and that she had lawfully paid over distributee's share, or had lawfully expended it, so that there was no ground for restraining suit on the judgment.—*Shipp v. McCowen*, Ga., 95 S. E. 251.

57. **Insane Persons**.—Attorney and Client.—Where an incompetent hires more attorneys than are reasonably necessary to fully protect his interest no recovery can be had for the excessive services, but a single allowance may be made and apportioned.—*Fitzpatrick's Committee v. Dundon*, Ky., 201 S. W. 339.

58. **Insurance—Continuing Representation**.—Stipulation in application for life insurance that policy shall not take effect until first premium is paid "during my insurability" was not continuing representation that applicant would remain in good health until application was accepted.—*American Nat. Ins. Co. v. Brown*, Ky., 201 S. W. 326.

59.—**Estopel**.—Where the property owner, on learning that a fire policy was in her divorced husband's name, sent her agent to the insurer's agent, who advised her to get an assignment, but said that the policy was all right, the insurer was estopped to defend under clause of policy avoiding it if the insured's interest were other than as therein stated.—*Mercer v. Germania Fire Ins. Co.*, Ore., 171 Pac. 412.

60.—**Explosion**.—Fire policy provision against liability from explosions, unless fire ensues, and in such event for fire damage only, does not exempt from liability for loss where fire preceded and proximately caused explosion.—*Western Ins. Co. of Pittsburgh, Pa. v. Skass, Colo.*, 171 Pac. 388.

61.—**Insolvency**.—Where insurance commissioner has charge of insolvent insurance company he may bring one suit for benefit of creditors to collect all unpaid subscriptions to capital stock, and if properly brought in county or residence of some of defendants others of same class may be joined, although not residents.—*McKey v. Wright*, Ga., 95 S. E. 217.

62.—**Proofs of Loss**.—That plaintiffs in their proof of loss to defendant insurer had placed value of furniture before fire and amount of loss at higher figure than found by jury, would not, as a matter of law, show plaintiff's fraud or false swearing.—*Royal Ins. Co. of Liverpool, England, v. Humphrey*, Tex., 201 S. W. 426.

63. **Interest—Computation**.—In calculating interest on note in case of partial payments, interest should be calculated on demand to first payment, added to principal, and payment deducted, then interest should be cast on remainder to second payment, interest added, and second payment deducted, etc., unless interest up to any payment shall exceed it, when payment is to be deducted from interest, and excess interest carried forward without casting interest to next payment that will discharge excess.—*Sutton v. Libby*, Mo., 201 S. W. 615.

64. **Libel and Slander—Injurious Publication**.—In suit for publishing article stating that plaintiff had leprosy, that court modified defendant's requested instruction that "word 'obloquy' is defined as blame, reprehension" by adding "a clause of disgrace or reproach" constitutes no cause for complaint.—*Lewis v. Hayes*, Cal., 171 Pac. 293.

65. **Life Estates—Remainderman**.—Adverse possession as to an easement does not run against a remainderman until the death of the life tenant, where legal title to property bur-

dened with easement was in trustee holding for life tenant's use, and remainderman derived title from power of appointment exercised by life tenant by will.—*Greenbaum v. Harrison*, Md., 103 Atl. 84.

66.—**Rentals**.—Where father and son leased land, it was competent for father's widow, to whom he devised life estate in all his property, instead of demanding possession, to permit lessee to continue in possession, in which case she would be entitled to rental which would have been her husband's had he survived.—*In re Doore's Estate*, Iowa, 166 N. W. 763.

67. **Malicious Mischief—Criminal Law**.—If reasonably prudent man would have deemed it necessary to drive automobile into dangerous place to escape more dangerous collision with driver of another car, driver of other car is criminally responsible for act which he rendered necessary.—*State v. Abney*, S. C., 95 S. E. 179.

68. **Mandamus—Warrant Holder**.—Where warrant of irrigation district is accepted in payment of its debt, warrant holder's remedy, if there are no funds to pay warrant and proper officers fail to certify necessary amount and make levy therefor, is exclusively by mandamus.—*Rio Grande Junction Ry. Co. v. Orchard Mesa Irr. Dist.*, Colo., 171 Pac. 367.

69. **Master and Servant—Agency**.—A foreman, in full charge of the employees in a room, is an "agent" within Rev. St. c. 50, § 30, whose knowledge of an accident makes written notice by servant unnecessary.—*In re Simmons*, Me., 103 Atl. 68.

70.—**Assumption of Risk**.—Where plaintiff servant, having been ordered to carry wood, inspected it, thought it too heavy, and so told foreman, who replied that he needed it and to get it if plaintiff cared about his job, and servant tried to carry log, and thereby suffered hernia, he assumed the risk and could not recover.—*Ehrenberger v. Chicago, R. I. & P. Ry. Co.*, Iowa, 166 N. W. 735.

71.—**Federal Employers' Liability Act**.—Where conductor, injured by rear-end collision when his train stopped, relied on rear brakeman to do his duty in back-flagging, negligence in this respect on brakeman's part would be chargeable to railroad company, and not conductor, under federal Employers' Liability Act.—*Eley v. Chicago Great Western R. Co.*, Iowa, 166 N. W. 739.

72.—**Ordinary Care**.—Pedestrian is not bound to guard against another's negligence in operating his automobile, but has a right to presume that ordinary care will be used to protect him from injury.—*Oelrich v. Kent*, Pa., 103 Atl. 109.

73.—**Protection of Employees**.—Where an employer makes a rule for the protection of employees, he admits the reasonable necessity for the conduct thereby prescribed, and a violation of the rule can be found to be negligence, and the master cannot assert that the rule is not necessary.—*Topore v. Boston & M. R. R.*, N. H., 103 Atl. 72.

74.—**Res Ipsa Loquitur**.—That section hand replacing old ties in defendant's railroad track stumbled over fence posts scattered along right of way and covered with grass did not show negligence of defendant.—*Baker v. Lusk*, Mo., 201 S. W. 357.

75.—**Respondent Superior**.—Where telegraph operator, while off duty, was injured by defect in roadmaster's gasoline speeder on which he was journeying to nearby town to procure supplies, on roadmaster's invitation, company was not liable to him as employee.—*Glover v. Chicago, M. & St. P. Ry. Co.*, Mont., 171 Pac. 278.

76.—**Statutory Construction**.—Industrial Commission's rule, and award based thereon, requiring employer to pay for medical services for two weeks after employee's disability occurs, is inconsistent with Rev. St. c. 50, § 10, requiring payment for medical services rendered during first two weeks after injury, where disability did not immediately develop.—*In re McKenna*, Me., 103 Atl. 69.

77. **Mechanics' Liens—Default**.—Subsequent default of building contractor who has become entitled to payment under his contract will not bar rights of a claimant who has secured lien on such earned payment by stop notice, though

contract permits owner to take over work and apply money not paid to contractor to expense of completion.—Moorestown Supply Co. v. Burns, N. J., 103 Atl. 83.

78. **Mortgages—Mechanics' Lien.**—Mortgage is entitled to priority over a mechanic's lien, though mortgage was not recorded until after work was begun, where contractor for building, claiming the lien, had knowledge that money was to be borrowed and mortgage given therefor.—Union Terminal Co. v. Turner Const. Co., U. S. C. C. A., 247 Fed. 727.

79. **Municipal Corporations—Bond of Officer.**—Bond of city treasurer providing that surety shall make good any loss sustained by city by any act of treasurer amounting to larceny, was sufficient; it not being necessary to detail in bond treasurer's duties.—City of Seaside v. Oregon Surety & Casualty Co., Ore., 171 Pac. 396.

80. **Contributory Negligence.**—Plaintiff's failure to take any precaution to protect his premises, after knowledge that sewer main was of insufficient capacity, constituted contributory negligence barring recovery against defendant city for damages due to sewer water backing up into plaintiff's basement.—Hume v. City of Chilton, Wis., 166 N. W. 776.

81. **Governmental Powers.**—Town has no right in governmental capacity to land occupied by street, but it has rights as municipal corporation owning land abutting on street.—Town of Brookline v. Loring, Mass., 118 N. E. 981.

82. **Independent Contractor.**—Municipality was not liable for death caused by fall of a smokestack being erected under contract, where such erection was not necessarily dangerous when done with care by persons having skill, and the municipality did not know the contractor was incompetent and did not control the methods or appliances of the contractor in performing the work.—Cash v. Casey-Hedges Co., Tenn., 201 S. W. 347.

83. **Presumption.**—Where plaintiff proves that the vehicle which caused his injury belonged to defendant, he makes a *prima facie* case, since the jury may infer that the driver was defendant's servant, and that the vehicle was being used for defendant's purposes.—West v. Kern, Ore., 171 Pac. 418.

84. **Negligence—Licensee.**—The implied invitation of a storekeeper is broad enough to include one who enters a general store with a vague purpose of buying if she sees anything that she wishes.—MacDonough v. F. W. Woolworth Co., N. J., 103 Atl. 74.

85. **Payment—Presumption.**—Where defendant agreed to deliver corn to plaintiffs, and executed receipts for advancements, and he delivered corn, it should be presumed that corn received was applied to receipts, and, when their amount in value had been delivered, plaintiffs could not recover attorney's fees as provided in the receipts.—Born v. Union Elevator Co., Ind., 118 N. E. 973.

86. **Physicians and Surgeons—Negligence.**—Where negligence charged was improper reduction of fracture, and use of improper appliances to keep fracture in position, act of defendant in his treatment of injury, not involving such charges of negligence, afforded no basis for recovery.—O'Grady v. Cadwallader, Iowa, 166 N. W. 755.

87. **Principal and Agent—Change of Employment.**—Where an automobile salesman was discharged, his going to work immediately on a farm did not as a matter of law forfeit his right to damages, since he was not bound to secure the master's consent to change his work, though the master could show what he could have earned had he secured employment of the same general nature as selling automobiles, if it was reasonably possible to secure such employment.—Bertholf v. Fisk, Iowa, 166 N. W. 713.

88. **Sales—Countermanding Order.**—Where buyer countermanded order several months prior to delivery of goods to carrier, and notified seller that he would not accept goods, seller's remedy was by a suit for breach of contract, or under Civ. Code 1910, § 4131.—Blackstock, Hale & Morgan v. Phillips-Jones Co., Ga., 95 S. E. 265.

89. **Specific Performance—Mutuality.**—Where contract between publisher and author merely

gave publisher option to acquire author's later work, and did not bind publisher to purchase it, option contract cannot be enforced, as negative covenant in contract of employment, because not mutual.—Kennerley v. Simonds, U. S. D. C., 247 Fed. 822.

90. **Stipulations—Breach of.**—Agreement between buyer and sellers of standing timber, each claiming title to land, made pending suit between them to determine title, requiring deposit of contract price with stakeholder, contemplated right of appeal, and buyer's withdrawal of fund after trial decision before right of appeal expired was a breach making him liable for damages.—Halstead v. New River Collieries Co., W. Va., 95 S. E. 208.

91. **Street Railroads—Acquiescence.**—That a borough made no effort for 12 years to question a street railway's right to occupy a highway formerly in a township from which borough had been set off was strong evidence of its acquiescence in street railway's claim to rightful occupation of the highway.—Pittsburgh Rys. Co. v. Borough of Carrick, Pa., 103 Atl. 106.

92. **Negligence.**—Evidence that plaintiff who intended to enter rear door of the pay-as-you-enter street car was injured by opening of front door while passing by it, etc., held not to establish street railroad's negligence.—Murray v. Cumberland County Power & Light Co., Me., 103 Atl. 66.

93. **Trusts—Implied Trust.**—Where agent in violation of his trust uses money of his principal, law implies trust in favor of principal, and to enforce it equity will subject property purchased to claims of principal, as against either volunteer or fraudulent grantee.—McKay v. Corwine, Ind., 118 N. E. 978.

94. **Resulting Trust.**—Where a husband acting as agent for his wife exchanged land belonging to her for another tract, thereby purchasing for her the land received in exchange, but took title in himself, the wife on discovering it was entitled to have a resulting trust declared.—Pickron v. Pickron, Ga., 95 S. E. 238.

95. **Wills—Contest.**—Where one contesting will had at one time been in charge of estate of testator, checks drawn by contestant were admissible as bearing on whether contestant had defrauded testator, and thus tending to rebut presumption of undue influence on part of proponent.—Monahan v. Roderick, Iowa, 166 N. W. 725.

96. **Lunacy.**—The finding of a lunacy commission as to testator's mental state three weeks before his death and covering a period during which the will was made is only *prima facie* evidence of facts found, and is not conclusive.—In re Coleman's Will, N. J., 103 Atl. 78.

97. **Statutory Construction.**—Civ. Code 1910, § 3851, providing that no one leaving a wife or child or descendants of a child shall devise over one-third of his estate to any charitable institution, prohibits a testator's exclusion of such persons, which prohibition is not made in the public interest, but only to prevent what the statute regards as a private wrong.—Monahan v. O'Byrne, Ga., 95 S. E. 210.

98. **Testamentary Capacity.**—Where the beneficiary under a prior will contested the proposed will for alleged lack of testamentary capacity, she could not succeed by showing that testator was always foolish and simple, but only by showing that incapacity arose between the making of the two wills.—Touhey v. Cooney, Iowa, 166 N. W. 684.

99. **Spendthrift Trust.**—Will devising a residue to three children, share and share alike, with right of survivorship, and putting share of son into hands of executor as trustee to pay income, with remainder to his heirs, created a spendthrift trust, so that trust property could not be reached by creditors of *cestui que trust*.—Everitt v. Haskins, Kan., 171 Pac. 632.

100. **Workmen's Compensation Act—Casual Employe.**—Under Workmen's Compensation Insurance, and Safety Act, § 14, a carpenter employed to erect a dwelling house, who worked for over three months at day wages, was not a casual employe.—Armstrong v. Industrial Accident Commission of State of California, Cal., 171 Pac. 321.

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DISCRIMINATION AGAINST ALIENS EMPLOYED ON PUBLIC WORKS AND LICENSED TO CARRY ON BUSINESS SUBJECT TO REGULATION.

In *Morin v. Nunan*, 103 Atl. 378, decided by Supreme Court of New Jersey, it was held that a township ordinance forbidding the issuance of any license to any alien for the transportation of passengers by automobile or motor vehicle for hire is legal.

The court said: "The fundamental question is whether the township has the legal power to discriminate against aliens by refusing licenses to run motor vehicles or jitneys through its streets for the carriage of passengers for hire. This under the cases seems to turn on the point whether the right to use the streets and places for private purposes of gain is a vested right or simply a privilege; if a privilege, it may be made to depend on citizenship, and such a classification is not illegal, and does not offend against constitutional prohibitions."

The opinion goes on to refer to many cases considering statutes imposing licenses, such as forbidding catching fish by seines or nets or the planting of oysters and fish in the waters of a state by non-resident citizens; the killing of wild game; employment on public works and the practice of law, by unnaturalized aliens, all of which have been held valid. U. S. Supreme Court sustained a state statute forbidding employment of aliens on public works. *Crane v. New York*, 239 U. S. 195, 36 Sup. Ct. 85, 60 L. ed. 218. The Crane case affirmed a judgment of New York Court of Appeals (*Crane v. People*, 214 N. Y. 154, 108 N. E. 427, L. R. A. 1916 D, 550, Ann. Cas. 1915 B, 1254). This case shows very elaborate consideration in opinions by three of the major-

ity of six and a dissenting opinion by one, judge in the minority.

Judge Cardozo, writing the main opinion, said: "So far as those trades or callings which are subject to governmental regulations are concerned, it is settled that the state may refuse to grant to aliens, because of the fact of alienage, a license to engage in them. * * * If the state may debar aliens from participating in those private occupations or trades which are subject to governmental regulation, as has been held in the cases cited, there is no room for the argument that it cannot debar aliens from working on its own public works which are wholly subject to its own control. * * * If the work were private and the public welfare in no way involved, it is clear that the legislature could not deny to the individual employer the right to employ aliens. If the work was private and the exclusion of aliens was, in fact, necessary to the protection of the public welfare, such exclusion would be within police power," citing *Yick Wo v. Hopkins*, 118 U. S. 356.

The New York case concerned the right of the state to do as it willed with its own, just as a private owner could, and the thought is suggested whether or not this reasoning may include the right of the state in its regulation of public utilities. Could it require by statute, that officers and employes of a public utility could be discriminated against for alienage, as employes in public work may be? The property of the state, in that which a public service company uses and thereby subjects itself to regulation by the state, under its police power, is dominant over that of private ownership, except that the latter is protected in its constitutional rights against confiscatory regulation.

The instant case, however, does not involve precisely the same question as that in the New York case. It more resembles that last above suggested—business by privileged persons and not engaged in as matter of right. There is, as is pointed out, in the

instant case, "inalienable rights which belong to human beings at all times and in all places," such as the right to labor for a living at the ordinary kinds of business.

When, however, a business becomes subject to regulation there are cases "which hold that the state can refuse to grant to aliens a license to engage in those trades, occupations or callings, which are subject to governmental control or regulation as a part of its police power," such as selling liquor, peddling, pawnbroking, etc.

For exercising the trade of a barber, it was held to be unconstitutional to bar an alien, as such. *Templar v. State Examiners*, 131 Mich. 254, 100 Am. St. Rep. 610. And so to carry on a laundry. *Yick Wo v. Hopkins*, 118 U. S. 220. And where a statute required employment of 80 per cent of native born citizens among a company's employes. *Truax v. Raich*, 239 U. S. 33, L. R. A. 1916 D, 545.

In this last case it was said, that the statute referring to every employer, whether corporation, partnership or individual "thus covers the entire field of industry. * * * The purpose of this act is not only plainly shown by its provisions, but it is frankly revealed in its title. It is there described as 'an act to protect the citizens of the United States in their employment against non-citizens of the United States in Arizona, * * * But police power, within the broad range of legislative discretion does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (14th) Amendment to secure."

In *Commonwealth v. Hanna*, 195 Mass. 272, 81 N. E. 149, 11 L. R. A. (N. S.) 799, the question was as to the validity of a statute restricting the issuance of a peddler's

license to citizens and those who had declared their intention to become citizens. The court said: "The business of peddling furnishes such opportunities for the practice of fraud that it is a proper subject for legislative regulation. That such regulation has been practiced from early times, both in Europe and America, is shown at length by Mr. Justice Gray in *Ernest v. Missouri*, 156 U. S. 296. The requirement of Rev. Laws that before receiving a license the applicant shall file a certificate from the mayor of a city that to the best of his or their belief, he is of good repute for morals or integrity, is a reasonable regulation for the protection of the public. If, in the same interest, the legislature deems it important that licenses shall be granted only to citizens of the United States, or to those who have declared their intention to become citizens, it can hardly be said that they have exceeded their constitutional right in passing a law to that effect."

Alienage is more an interesting question now than heretofore in our history, in view of our entrance into the world war. And while all questions with this aspect may be thought to be rather for consideration by Congress than by legislatures, yet the view could be enlarged as to action under state police power. The presence of danger in view of facts within judicial cognizance may be taken into consideration.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW — CONSTITUTIONALITY OF SELECTIVE DRAFT LAW.—The Supreme Court has again decided that the Selective Draft Law is constitutional; that Congress' power to raise armies is not limited by the Militia Clause of the Constitution. *Cox v. Wood* (decided May 6, 1918).

The plaintiff in a proceeding against Major General Wood, Commandant of Camp Funston, sought by a writ of habeas corpus to secure his release from defendant's authority on the ground that the law under which he was se-

lected and directed to report to defendant was avowedly for the purpose of forcing him into military service in a foreign country which plaintiff contended was contrary to the limitation of the Constitution, which provided that the power to call the national militia into federal service shall have for its sole purpose "to execute the laws of the Union, suppress insurrections and repel invasions."

Although the Supreme Court had answered this and other objections to the draft law in the Selective Draft Cases, 245 U. S. 366, Chief Justice White, succinctly summed up the reasons for upholding the rights of Congress to raise an army by conscription as follows, to-wit:

"(a) That the power of Congress to compel military service and the duty of the citizen to render it when called for were derived from the authority given to Congress by the Constitution to declare war and to raise armies. (b) That those powers were not qualified or restricted by the provisions of the militia clause and hence the authority in the exercise of the war power to raise armies and use them when raised was not subject to limitations as to use of the militia, if any, deduced from the militia clause. And (c) that from these principles it also follows that the power to call for military duty under the authority to declare war and raise armies and the duty of the citizen to serve when called were coterminous with the constitutional grant from which the authority was derived and knew no limit deduced from a separate and for the purpose of the war power wholly incidental if not irrelevant and subordinate provision concerning the militia found in the Constitution."

PUBLIC SERVICE CORPORATIONS.—DAMAGES FOR DISCRIMINATON BETWEEN COMPETITORS.—It has been established by American decision, that mere reasonableness in rates to be charged by public service companies is not the only obligation by them, but in addition, there is an anti-monopoly rule, which prevents them from favoring one individual, so that free competition between all customers might be unduly affected. A recent work on public service companies treats this question quite extensively. Collier on Public Service Companies, 1918, pages 276-283.

In Homestead Co. v. Des Moines Electric Co., 248 Fed. 439, decided by Eighth Circuit Court of Appeals, where there was alleged a discrimination in lesser rates being charged to a competitor in business than to plaintiff and the petition claimed as damages the difference between the two rates, it was held, that the petition showed a cause of action, but the true measure of damages was expected profit

that reasonably might have been earned had there have been no interruption or depression caused by the unlawful discrimination.

Speaking of the facts in the case at bar, Sanborn, C. J., said: "The plaintiff in effect avers that, if the defendant had not unjustly discriminated against it, it would have sold the same amount of its products * * * and that it would in that case have had left" a named amount in profits prevented from being realized by the unjust discrimination.

It was said: "It may be that plaintiff will have difficulty in proving * * * such or any loss of profits, under the wise and conservative rules of law which guard against speculation, uncertainty and conjecture in the determination of such losses, but the averments of the complaint are sufficient to permit it to present competent evidence of a loss of profits caused by the unjust discrimination it pleads."

Stone, C. J., concurring specially, thought that generally the measure of damages would be the difference in the two rates, but where there are competitive conditions and these are affected by discrimination, "there is an additional consideration. The object of business is profit, when anyone by an unlawful act reduces the profit of another, the law provides for restitution of that loss. Competition limits the sale price. When a business man is given a lower rate for power or some other element entering into the fixed cost of the article he produces, it is an absolute certainty that his profit has been increased by just the amount of the reduction. It is equally certain that every competitor has been put at a disadvantage in just that sum."

But is it true that this is the only damage he suffers? The competitor captures the market. The other man cannot do business at all. If he has had an established business, it thenceforth is or may be destroyed. And must competition be confined in so strict a sense? If one competitor cannot live as cheaply as another and, therefore, must charge more in carrying on his business than the other, has not the one to whom has been accorded a preferential or lower rate, at least in the necessities of life, a great advantage in the world of competition? So many things in these days of competition and classification exist, that it is hard to tell what enters into the domain of overhead expense in business. At least we know, that *omnia presumuntur contra spoliatorem*, and nothing is inferred in favor of a willful wrongdoer. And there ought to spread the idea that benefits of a special kind are spoliations of public right.

CORPORATIONS—IMPLIED POWER AS TO GUARANTY AND SURETYSHIP.—In *M. Burg & Sons v. Levin City Four Wheel Drive Co.*, 107 N. W. 300, decided by Supreme Court of Minnesota, a written guaranty by the general manager of a business corporation, not by express provision in its charter or any general incorporation statute authorized to become guarantor in surety for another, to the effect that it would guarantee an account of a certain person, was saved by evidence, that such person was a valuable employe and had threatened to quit the service of the corporation, unless such account was guaranteed by the corporation.

The facts show that an employe, regarded as a valuable salesman, wanted to get married and to begin keeping house. He asked the general manager to advance him money to purchase furniture or give a guaranty to a merchant for its amount. He had secured some "prospects" as a salesman, but had not formally assigned the commissions he would earn therefrom to the corporation, but he notified the general manager that, unless his request for an advance or a guaranty was complied with, he would quit the corporation's employ.

In adjudging corporate liability upon the guaranty, the court said: "It must be assumed, therefore, that it was a benefit to the corporation to put White (the employe) in a position where he could purchase the furniture, thus inducing him to remain in the employ of the corporation. Of course, defendant corporation had no express power to guarantee or become surety for debts of its employes, but we think it may be said that such a power may be implied as an incident to the business that the corporation was authorized to do. * * * We are cited to no case directly in point."

And respectfully we suggest that we do not believe any case in point supporting the court's view is to be found.

It is to be conceded that a corporation will be precluded from pleading *ultra vires* as against a suit where it has received a benefit, as long as it holds on to the benefit. But this principle is in cases where the benefit has been supplied by the plaintiff, or other person against whom *ultra vires* is sought to be interposed as a defense. It does not cover a case where the benefit is by some third person. What benefit was extended to the corporation by the plaintiff in this case? May it be said, that a derivative, as well as a direct benefit, is sufficient? If so, then it may be

that no instance, in which a benefit may not be worked out, can occur, and the rule against invalidity of a contract of guaranty or suretyship by a corporation is of no practical value whatever. The next advance, if this ruling stands, will be to feature good will of an applicant, whose debt is to be guaranteed by a corporation, as sufficient to support a guaranty at his request in favor of one to whom the guaranty is given.

"STARE DECISIS."

In these days of progress, or rather the craze to follow things called progressive, whether in political matters, social matters or in the enactment of general statutes, even in regard to mere forms of administration, when in general life we see things accomplished that were not dreamed of even by Mother Shipton, and when this craze has been directed against Courts and Judicial Procedure, as evidence the popular cry for the recall of judges and the recall of judicial decisions; when the popular mind is led to view with less respect matters in connection with the administration of law and has lost a great deal of the old reverence for ancient things, emphasizing its contempt for the ancient learning upon which our system of jurisprudence is built up, by expressions such as "digging into musty tomes" and "worm-eaten books," it is well, perhaps, to pause and consider whether we as lawyers and the judiciary largely are not bound too much by ancient precedent and follow too closely decisions that in view of changed conditions should be now based rather upon fundamental principles, than abiding closely by former decisions known as the rule of *Stare Decisis*.

That this rule is a salutary one in a great many cases, is without doubt. That when a court of the last resort has carefully considered a rule of property and announced it in a well considered opinion which has been adhered to by the people of the juris-

diction generally and upon which they have held and dealt in property, such an opinion should not be lightly overthrown or changed in accordance with, perhaps we might say, the whim of every new judge that might be elected or appointed, appeals to every well-balanced mind.

The rule of *Stare Decisis* is founded on public policy, but to give to this rule such adamant power that no court would be permitted to depart therefrom, and to make it a law like that of the "Medes and Persians, which altereth not," is to emphasize the fact of "judge-made laws," which has been so largely criticised in the press of late years.

There are, as we all know, underlying our judicial procedure, which has been built up through so many centuries, certain fundamental principles which are like axioms in the domain of mathematics. These principles are unchanging. No conditions of changing sociology or government should be permitted to eradicate or change any of these fundamental principles. The decisions of courts, however, should not be held to such a strict and adamantine rule. These decisions are the application of these fundamental principles through processes of high reasoning to the conditions as they at the time exist in the commonwealth which are exemplified by the facts of the particular case. To be bound absolutely from year to year and from age to age by decisions of courts so that an inflexible rule of law is established thereby, while we are met by so many changing conditions, is to violate other legal maxims, such as "When the reason for the law fails, the law fails"; and "Let justice be done though the heavens fall."

The rule of *Stare Decisis* has been variously stated, and perhaps that one most approved is the declaration of Chancellor Kent, who states: "A solemn decision upon a point of law arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can

have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case." A reading of this explanation of Chancellor Kent shows that his idea of the rule was not as inflexible in its binding power upon courts, as is held in a great many decisions and as viewed, I might say generally, by lawyers. That such a decision should be binding upon lower courts when made by the courts of last resort until reversed, is certainly a salutary rule, but the very fact that it can be reversed shows that it is not inflexible or adamant upon the Supreme Court.

There is a great deal of criticism amongst those writing upon legal subjects and procedure, against what is known as "Case Lawyers." It is, perhaps, easier in the practice of the profession to hunt through and find a case declared in the expression "on all fours with the case at bar," and to argue to a court that the case being on the same statement of facts that decision should be followed, than it is to build up an argument based on the fundamental principles, that we all must admit are inflexible in our theory of jurisprudence, through sound and well thought out or well reasoned arguments. But the habit of courts, which, of course, makes their work easier, to brush aside any new thoughts and base a decision on one that has been made before, whether in its own court or in others, that are considered as of weight, tends to make "Case Lawyers."

An illustration with which we are particularly interested as to these changes in conditions which require a departure from old rules and decisions, which may not in any way disregard or annul fundamental principles, is to be seen in regard to the application of the doctrine of Riparian Rights. That doctrine was followed for a great many years in England and in the eastern part of this country which adopted

the common law of England as the basis of our jurisprudence. The conditions as they exist and have continued to exist largely in England where the doctrine originated, made this a salutary doctrine, but when in this western country we found a different condition in that the proper development of the land and its use and enjoyment required the diversion of water from its channel to be applied for irrigation purposes, it was necessary that Riparian Rights doctrine under our conditions should not be the rule of construction. Yet, owing to the rule of *Stare Decisis*, largely, the courts were very loath to depart from this time-honored doctrine and to apply that which has now become the rule of law in the arid regions, of prior appropriation giving the better right. This question as we all know is largely involved in the case now pending before the Supreme Court of the United States between the State of Wyoming and the State of Colorado, and in some respects it will be necessary for the Supreme Court of the United States, in case of Wyoming winning the suit, to abrogate this doctrine of Riparian Rights under the changing conditions and circumstances as they exist in these mountain states.

An illustration of how a wrong may be perpetuated and continued by reason of this rule, is illustrated by the statement made to me some time ago by the late E. F. Richardson, the eminent lawyer, of Denver, in regard to the rule of law relating to public carriers, which while insuring a man's goods or his baggage, does not insure his personal safety. He said that this rule seemed to him so inequitable that he thought he would run it down and find where it originated, and upon doing so found that it started from a dissenting opinion by a judge in New York State in early days, which dissenting opinion was adopted as the majority opinion by another court, and that courts from that time on almost universally where the question had been raised, had followed this majority opinion of the other court which was

founded on the dissenting opinion in the New York case, to such an extent that it had become an almost universal rule of decision. How many more rules of decision considered by courts to be obligatory upon them under the rule of *Stare Decisis* have originated on equally slight foundations, it is hard to say without an exhaustive search.

I wish to say that I do not desire in any way to criticise our own Supreme Court by anything I may say in this address. I feel that our own court has, perhaps as much as any other court in the country, been inclined whenever changed conditions appear to require the setting aside of former rules of decisions, to follow the real rule, or what I consider to be the real rule, of *Stare Decisis*, and where the conditions require it depart from strict following of past decisions or past rules. This is illustrated not only in the way that our court has handled the irrigation questions and rule of Riparian Rights, but also in the late decisions, where in three cases of men condemned to death in which proper objections and exceptions were not taken in the court below, or where the matter was not presented to the court below on the Motion for a New Trial, our court refused to be bound by the past rule that has been adopted, not only in Wyoming but in a large majority of the states, that the Supreme Court will not consider any matter which has not been properly excepted to in the court below; a rule which has been as strong perhaps and as inflexible as any rule of procedure in Appellate Courts.

I do not wish to give the impression that I think that the rule of *Stare Decisis*, or other rules of similar import, in regard to decisions of courts, should be done away with. Such a procedure would be to throw into chaos and to render the scale of justice uneven and to make our jurisprudence uncertain.

A great deal of the complaint, however, that may be and has been made against following precedents and former decisions

is due to the fact that the true rule is not understood. From the expression used in decisions where this rule is referred to, courts or judges seem to think that the rule means that a court is not at liberty when a point of law has been settled by a former decision, to afterwards depart from it, instead of taking the rule as stated above by Chancellor Kent. Were the rule of *Stare Decisis* absolute and inflexible, as believed to be the rule by some, a strict adherence thereto would in a comparatively short time, without new cases arising, prevent the consideration by courts of cases under new conditions being brought before them, and the law would become a fixed measure or rule only to be changed by legislation. Decisions as to construction of statutes governing procedure might well when properly considered and reasoned, be considered as permanent, and if the necessity existed by reason of changed conditions or otherwise for a change in these rules, legislation could be appealed to to correct any evil that may arise.

It is an old maxim that "all rules have exceptions" and that "the exceptions go to prove the rule." Rules of decision according to administration of *Stare Decisis* should be viewed in this sense. The tendency of our courts and our lawyers, as stated above, has been too much, perhaps, towards making this rule inflexible and to refer to some past decision as having settled a present case. From this has grown the present tendency of "Case Lawyers." We look up with reverence to those names of the old lawyers and advocates, mental giants, who have presented well reasoned arguments and orations to courts on important questions. Their arguments were based on fundamental principles and not on decided cases.

How often do we see in decisions the expression "the weight of authority" is thus and so, showing there is a difference in the decisions of courts in various jurisdictions; more have decided one way, perhaps, than another. The reason for this diversity of

opinion and diversity of decision is not because of difference in fundamental principles or what are considered to be such by various courts, but from the way that various courts argued from different conditions in different jurisdictions. How much then should courts everywhere consider the conditions under which the former decision was rendered and the conditions of today. There is a maxim that says, "The law of necessity is the law of time, that is, time present." An application of this principle to this rule of *Stare Decisis* and as modifying the rule, would express the idea that I have in mind.

The feeling of unrest of the community at large that there should be some change generally called "progress" in the administration of justice and the conduct of our courts, might well be effected if the bench and the bar would be insistent upon administering this rule according to what seems to me to be its true intent and purpose, rather than that in which to a large extent it has been used.

At the present time the world is much agitated over proper rules of International Law, owing to the changed conditions of warfare. The Maritime League to which the jurisdiction of the country extends into the sea under the old conditions and which has been a fast rule of International Law, was based upon the farthest range of a cannon shot. Under the conditions in which submarines and Zeppelins, under the seas and in the air, and when the range of our modern guns extend to twenty-five miles, were there court of last resort on international questions, it might well be reasoned that for purpose of jurisprudence and neutrality this limit could be vastly extended. What is or what is not allowed by the rules of *civilized warfare* under the conditions of 42-centimeter guns with smokeless powder that are aimed by scientific means at objects unseen and unseeable by those shooting the guns, directed perhaps by airships or telephones from a

distance? What shall be the rule as to poisonous gases used against the enemy? And numerous other means that have been brought out in the present European struggle under recent scientific innovations, can no longer be decided by past precedents or rules, even those that have been regulated by treaties when present conditions were not contemplated.

Rules of evidence have been changed and are changing on account of new appliances. The question of the introduction of photographs and of radiographs has been materially changed, and as new methods of ascertaining and proving facts become established, the rules that would have formerly prevented admission as evidence of many things have been changed to meet advancing conditions. Decisions authorizing the right of contract between employer and employee, in view of present industrial conditions, have undergone and are undergoing changes. True, many of these old rules have been abrogated by statute, but the interpretation of other provisions, the rights of the road now occupied by automobiles, are modified from what they were when only the horse and drawn vehicle were in question. The question of the navigation of the air and the right to pass above one's property, are things we can see are to be thrashed out in the future in the increasing use of these means of transportation.

The world moves. The administration of the law must not stand still. Everlasting principles must not and cannot be abrogated, but it depends upon the lawyers of the country in their presentation of cases to the courts, and the courts interpreting the laws as adapted to new and changing conditions, to be governed by true reason based on principles and not necessarily on former decisions of their own or other courts which were based upon a different state and condition of human society and welfare.

CHAS. E. BLYDENBURGH.

Rawlins, Wyo.

A WARNING AGAINST THE CENTRALIZING TENDENCIES OF WAR LEGISLATION.

Hidden away among the usual formalities and generalities of a bar association report is often found some jewel of thought or expression "of purest ray serene," which it is the duty of the legal journalist to bring to the light of day.

Of such a character we believe is that subdivision of the last report of the Committee on Jurisprudence and Law Reform of the Alabama Bar Association, which refers to the destruction of the principle of local self government involved in the necessary measures taken to carry on the present war with Germany. Mr. Forney Johnston, of Birmingham, Alabama, is the author of the report which in its thought and literary quality reflects great credit on its author. The report says:

"In this great crisis now upon us there has never been ground for difference of opinion. The American government acted when no other course was debatable. Since that grey day in our history every dollar and every drop of blood in Alabama is, under the Constitution, enlisted for the war. Only through unqualified recognition of this fact, with its grave consequences, can the State assert in time of peace that sovereignty under the Constitution, which, in time of war, rests exclusively in the national government representing all of the states. This is Alabama's war. Sibert of Etowah, stands nearest the fighting line in command of the American troops. Alabama boys are under arms, in camp, and on the march. Under Gorgas of Tuscaloosa, is the organized medical skill of the nation to guard the vast army now in the making. The senators and representatives from Alabama are voting incalculable resources in evidence of Alabama's part in the struggle. As a sovereign state acting through its representatives, Alabama is asserting its sovereignty in the method assured under the Constitution in time of war and no citizen can repudiate its action and be loyal. In consenting to the abrogation of local rights, to the suspension of state control over the interchange of commodities and the agencies of transportation within her borders;

in submitting to direct taxation which will cut to the bone; in freely assuming her part of the burden, the State is not surrendering, but is asserting, her sovereignty under the greatest of all treaties—the Constitution of the United States; is asserting the right to have her citizens protected against murder on the high seas, to establish her right and the world's right to peace. To oppose these things is to stand in the way of the high prerogatives of the State, as well as to be guilty of treason to the nation.

"But the people should never be permitted to forget that these conditions arise out of the war, and are based exclusively upon the provisions of the United States Constitution relating to war. To use them as precedents or subterfuges for the permanent intrusion of national interference in local matters in time of peace involving an essential surrender of state sovereignty would be as treasonable as to oppose the state's ready acquiescence in these measures in time of war.

"The American colonies were organized by states, enjoying their separate autonomy direct from the crown. The American system is based on the administration of local affairs through local action. Administrative law and constitutional law have thus acknowledged the same limitations. Local self-government is an Anglo-Saxon principle which became possible in England on account of her insular position, in contrast with the centralized type of administration forced on the free states of Europe by the external pressure of powerful neighbors. The surrender of self-government in local matters to national authority is justifiable only by military necessity or like emergency, by the fear of war, by the lack of the ability for self-government or the absence of a spirit of liberty. The principle of "local self-government" embodied in the American system has been justified after too many centuries of political experience, by the blood of too many patriots, to be discarded as a trite phrase. That centralized efficiency, which works under a Prussian lash in Europe, is the result and the prophesy of war, civil or external.

"The difficulty and the danger for the American Bar to realize and make plain is that the fine democracy expressed in the phrase "local self-government," is not only sound politics and the only condition to which liberty loving people capable of self-

government should submit, but is the last word, in time of peace, in simplicity, efficiency and economy of local administration. It stands the test of efficiency to-day as surely as it responded to the indomitable demands of our political philosophers of the past. To surrender it for the waste, the injustice, the lack of flexibility and sympathy with local necessities and traditions, which is characteristic of an attempt to centralize local regulation would be to sacrifice the peace usages and customs of democratic America for a condition that is the horrid progeny of war—tolerated in time of peace only in countries where self-government is passively surrendered by the people or is excluded by the fear of war."

BENEFICIAL SOCIETY—SUICIDE.

GATES v. KNIGHTS TEMPLARS & MASONIC MUT. AID ASS'N.

Kansas City Court of Appeals. Missouri.
April 1, 1918.

20 S. W. 280.

Under Rev. St. 1909, § 6945, abolishing the defense of suicide, except where insured contemplated suicide when he applied for the policy, a fraternal order insuring lives on the assessment plan cannot by contract embodied in its policy provide that a smaller amount than the face of the policy shall be paid in case of suicide.

BLAND, J.: Defendant, a foreign life insurance company doing business on the assessment plan in this state, insured the life of Erskine M. Gates in the sum of \$2,000, in favor of his wife, who is the plaintiff. The policy provided:

"That in case a member shall die by his own hand, sane or insane, this association will pay to the beneficiary the amount of money paid by the member to the association, without interest, but such payment shall in no case exceed 50 per cent of said sum of \$2,000."

It is admitted that the said Erskine M. Gates committed suicide in this state by taking carbolic acid. The defendant refused to pay the face value of the policy, but tendered to plaintiff the sum of \$296.61, the amount payable under the policy providing the suicide clause is valid. Plaintiff refused this tender and brought suit for the full amount of the policy, and judgment being rendered in her favor for

the amount sued for, defendant has appealed.

It is now firmly settled in this state that section 6945, R. S. 1909 (abolishing the defense of suicide in all cases except where the insured contemplated suicide at the time of his application for the policy), is applicable to insurance companies on the assessment plan. Section 6959, R. S. 1909; *Collins v. Mut. Life Association*, 84 Mo. App. loc. cit. 556; *Logan v. Fidelity & Casualty Co.*, 146 Mo. loc. cit. 123, 47 S. W. 948; *Toomey v. Supreme Lodge*, 147 Mo. loc. cit. 137, 48 S. W. 936; *Elliott v. Insurance Co.*, 163 Mo. loc. cit. 157, 63 S. W. 400; *Anderson v. Missouri Benefit Association*, 199 S. W. 740. However, it is the contention of the defendant that although suicide is not a defense to this action, nevertheless, the company may lawfully provide that a smaller amount than the face of the policy be paid in case of suicide, and in support thereof cites the case of *Scales v. National Life & Accident Ins. Co.*, 186 S. W. 948, recently decided by the Springfield Court of Appeals. The St. Louis Court of Appeals in the case of *Applegate v. Travelers' Ins. Co.*, 153 Mo. App. 63, 132 S. W. 2, had under consideration a policy of insurance which provided that the company, "in the event of the death of the said Oliver H. Applegate (the insured), loss of limb or sight, or disability caused by gas, vapor or poison, shall pay but one-tenth of the amount otherwise payable." In that case the insured committed suicide by drinking a liquid poison known as carbolic acid, and the St. Louis Court of Appeals held that under section 6945, R. S. 1909, the company was liable for the full amount of the policy, and could not discharge its obligation by paying one-tenth of the amount, and the same court in the case of *Dodt v. Insurance Co.*, 186 Mo. App. loc. cit. 176, 171 S. W. 655, approved the Applegate case in very strong language.

The Springfield Court of Appeals in the case of *Scales v. National Life & Accident Ins. Co.*, supra, had under consideration a policy that provided that where death resulted from "any gas, vapor, narcotic, anaesthetic or poison," the insurance would be for but one-fifth of the amount of the face of the policy (terms similar to those of the policy in the Applegate case), but held, differing from the St. Louis Court of Appeals in the last-mentioned cases, that an insurance company might provide for the payment of a certain amount of money for the death or injury resulting from certain causes and a different amount for a death or injury resulting from other causes where it happens under certain designated circumstances. In the Scales case the evidence showed that the

insured came to his death by intentionally taking carbolic acid for the purpose of committing suicide. The Springfield court of Appeals held in that case that the fact that the insured committed suicide had nothing to do with the right of the company to provide for a less amount of insurance where the insured died by reason of taking poison, and that as the less amount was not based upon any contingency that he died of poison taken with suicidal intent, the question as to whether the insured committed suicide or not was not in the case, there being nothing in the laws of Missouri preventing the company from insuring for a less amount in case of death, resulting from any cause, such as the taking of poison, so long as the smaller amount was not based upon the contingency of the insured committing suicide. The Springfield Court of Appeals transferred the Scales case to the Supreme Court on the ground that it was in direct conflict with the Applegate case decided by the St. Louis Court of Appeals.

It is apparent if the Springfield Court of Appeals had before it the case at bar, that it would decide that the clause in this policy providing for a reduced amount in case of suicide was void, and that plaintiff was entitled to recover the full amount. The clause in the policy in the case at bar does not provide for a smaller amount of insurance in case the accident happened under any other conditions, except that of suicide on the part of the insured. This case is to be distinguished from that of the Scales case, for the reason that the decision in the Scales case is based, as we have already stated, on the proposition that the company may provide for a less amount of insurance when the policy contemplates that there shall be the smaller amount, whether the poison was taken accidentally or with the intention of committing suicide. The provision of the policy in the case at bar is entirely unlike the provision of the policy in the Scales case, as the only cause providing for the reduction of the amount of this policy is in case the insured committed suicide. We recently had this same question before us in the case of *Anderson v. Missouri Benefit Association*, supra, and decided that the company, under our statute, cannot by contract make suicide a partial defense or reduce the amount of recovery.

From what we have said we are not concerned with the difference of opinion between the St. Louis and Springfield Courts of Appeals on the question involved in the Applegate and Scales cases, and we do not deem that this opinion is in any wise in conflict with the opinion of the Springfield Court of Appeals.

The judgment is affirmed. All concur.

NOTE.—Foreign Fraternal Associations as Being or Not Insurance Companies.—The statute of Missouri (§ 6945 R. S. Mo. 1909) referred to in the instant case says: "In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, to a citizen of this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy and any stipulation in the policy to the contrary shall be void."

In *Travelers' Protective Assn. v. Smith*, 183 Ind. 59, 107 N. E. 283, the effect of suicide of a member of a fraternal association organized under Missouri law was considered. It was said that: "The courts of Missouri have held that the suicide section (§ 6945 set out above) does not apply to fraternal beneficiary associations not organized for profit and that such associations are not subject to the provisions of the general insurance laws."

There was cited the case of *Tice v. Knights of Pythias*, 204 Mo. 349, 102 S. W. 1013 and there it was held that there was a distinction between fraternal beneficial associations and assessment companies, because the former is not in business for profit and the amount payable is not certain, while as to the latter the contrary is the fact, citing *Toomey v. Supreme Lodge*, etc., 147 Mo. 130, 48 S. W. 936.

The instant case does not distinguish between fraternal associations and assessment companies, but it does not cite at all the *Tice* case, where the Missouri Supreme Court, a court binding the court in the instant case, did distinguish between the two classes of companies.

But in view of U. S. Supreme Court ruling as to the faith and credit clause to be given to charters by the courts of the home state of fraternal associations the question occurs as to what right has another state to control the doing of business there or to place any interpretation by force of its own law on the right of contract between members of a fraternal insurance association. In other words, suppose the Missouri statute had in terms attempted to include beneficial insurance societies, would it have been valid legislation?

In *Supreme Lodge Knights of Pythias v. Mims*, 241 U. S. 574, 36 Sup. Ct. 702, 60 L. ed. 1179, L. R. A. 1916 F. 919, it was held that a member of a voluntary unincorporated fraternal and benevolent association has a right to have contracts between its members construed in Texas just as they are construed at the home of the association's charter.

association's charter, the latter construction controlling everywhere.

This case cites for authority that of *Supreme Council Royal Arcanum v. Green*, 237 U. S. 531, 35 Sup. Ct. 724, 59 L. ed. 1089, L. R. A. 1916 A, 771, approving *Reynolds v. Sub. Council R. A.*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776. The *Mims* case lately has been followed in *Sup. Lodge K. P. v. Smyth*, 38 Sup. Ct. 210.

Chief Justice White in the *Green* case, *supra*, speaks of "the intrinsic relation between each and all the members," as resting on the constitution and by-laws, and of "a collective and unified standard of duty and obligation on the part of the members themselves and the corporation." As to whether such a corporation could be the representative of all its members in a court, it was found unnecessary to declare. This case was appealed from New York in which state it was held Massachusetts construction must be followed.

In *Reynolds v. Sup. Council R. A.*, *supra*, Massachusetts Supreme Court declared the meaning of the charter, that U. S. Supreme Court held must be respected in New York under faith and credit clause. This case speaks of a reserved power of amendment when adopted as provided.

But are such associations really insurance companies? It was held in *Penn. Mut. L. Ins. Co. v. Mechanics' Sav. Bk. & Tr. Co.*, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 33, that benefit certificates in mutual aid societies do not amount to "existing insurance" in the sense intended by a statute of Pennsylvania. It was thought that the statute did not embrace "insurance in mutual benefit associations which are not ordinarily described as life insurance companies, and that doubt has often arisen whether the contracts they issue are properly or technically described as life insurance at all." Judge Taft who spoke thus, further expressed doubt whether the rule of construction of insurance contracts—resolving ambiguity in favor of insured—applied to them at all. See *N. W. Masonic Aid Assn. v. Jones*, 154 Pa. 99.

There is a very great deal of diversity of view as to whether these associations are deemed insurance companies and benefit certificates to be construed like insurance policies, but at all events should a general statute about insurance companies and insurance policies be taken to embrace them and the certificates they issue?

Of course police power may generally take hold of contracts and reform them, when there is reasonable ground for its operation, and the subject of insurance is to be deemed one as to which there may be regulation under police power, but when it is considered, that at bottom those arrangements are wholly *inter se*, members contracting in regard to a lawful thing, and that they acquire vested rights thereby, must not the purpose be very clear, that police power means to intervene in private contractual arrangements? As to an insurance company it comes under a different rule. A fraternal benefit society has no intrinsic rights in the matter at all. It gathers from members and distributes what it gathers.

And then there is the principle, that a non-resident as to his contractual rights must not be discriminated against as between him and a resident. Now, if one has the right to contract with others, shall it be permitted that, yet if one with whom he contracts resides in another state, the statute of that state may say, that under police power citizens of its state shall not be bound as others are?

C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1918— WHEN AND WHERE TO BE HELD.

American—Cleveland, Ohio, Hotels Winton and Statler; August 28, 29 and 30.
 Alabama—Montgomery, July 12 and 13.
 Arkansas—Little Rock, May 30 and 31.
 California—San Jose, June 6, 7 and 8.
 Colorado—Colorado Springs, July 12 and 13.
 Georgia—Tybee Island, June 7 and 8.
 Hawaii—Honolulu, May 29.
 Illinois—Chicago, Hotel LaSalle, May 31 and June 1.
 Indiana—Indianapolis, July 10.
 Iowa—Des Moines, June 27 and 28.
 Kentucky—Danville, July 2 and 3.
 Maryland—Atlantic City, N. J., Hotel Chelsea, June 27, 28 and 29.
 Michigan—Kalamazoo, June 28 and 29.
 New Hampshire—Crawford House, White Mountains, July 6.
 New Jersey—Atlantic City, June 14 and 15.
 North Carolina—Wrightsville Beach, June 25, 26 and 27.
 Ohio—Cleveland, August 26 and 27.
 Oregon—Portland, November 19 and 20.
 Pennsylvania—Bedford Springs, June 25, 26 and 27.
 South Carolina—Spartanburg, about August 1.
 South Dakota—Sioux Falls, latter part of July.
 Tennessee—Chattanooga, August 7, 8 and 9.
 Texas—Wichita Falls, July 3, 4 and 5.
 West Virginia—Elkins, July 16 and 17.
 Wisconsin—Racine, June 26, 27 and 28.

PROGRAM OF THE 1918 MEETING OF THE ILLINOIS BAR ASSOCIATION.

The Quarterly Bulletin of the Illinois Bar Association for May, 1918, is actually bristling with literary sword thrusts completely permeated by the war impregnated atmosphere of society as it exists to-day. So far is this true that the first published announcement concerning this meeting is to the effect that no one will be allowed to talk on any subject other than the war. We quite imagine that no one will wish to talk on any other subject, nor will anyone be capable of getting his wits together to talk on any other subject.

The announcement goes on to say that "we plan a get-together, get-acquainted meeting of the lawyers of Illinois, with the one big ques-

tion for discussion, 'How can we help win the war?'" President Tolman's address will be along this line. Gov. Lowden, who has been an active member of the Association for over twenty years, will address the Association, and the presidents of the District Federations will report the war activities of the lawyers of their districts.

The place of meeting is at the Hotel LaSalle, Chicago, May 31 and June 1, 1918. Saturday's session will be occupied with reports of the various committees, and addresses by representatives of the War Activities of the National Government. At this time the committee is unable to announce the names of representatives of the Government who will be present at the Saturday meeting. The annual banquet will be held Saturday evening at the Hotel LaSalle.

Among those who will address the meeting will be Hon. Edgar Bronson Tolman, President of the Association; and Hugh S. Magill, whose subject will be, "Illinois and the Centennial."

In addition to reports of general and special committees there will be special reports of war work done by Illinois lawyers, which no doubt will disclose some very interesting features of the activities of lawyers at the present time.

The Judicial Section of the Association will meet Friday, May 31st, at the Hotel LaSalle, at ten o'clock. Hon. Orrin N. Carter will preside. One of the subjects for discussion is the "Memorial of the American Bar Association Respecting Written Opinions—Should They be Required in Every Case?"

The Illinois branch of the American Institute of Criminal Law and Criminology will also meet in Chicago in connection with the State Bar Association meeting, and their sessions will be held May 31st, at two o'clock; and at ten o'clock, June 1st, Prof. Wm. G. Hale of Urbana, will deliver the President's address. Hon. Frank Johnston will read a paper entitled, "Enforcing Concealed Weapon Laws." Mr. W. S. Reynolds will speak on the subject, "Shall Illinois Have a State Probation Commission?" Hon. John L. Whitman, of Springfield, will discuss the question of the "Operation of the Parole Law in Illinois."

A noteworthy feature of the Bulletin is the long list of names of Illinois lawyers in military service. This list includes the President of the Association, who recently has been commissioned as Major in the Adjutant-General's department, and is now in charge of the Cook County branch of State Headquarters in connection with the administration in Illinois of the

Selective Service Act. Another well-known lawyer, Hon. Nathan William MacChesney, has the rank of Judge Advocate General.

PROGRAM FOR THE MEETING OF THE NEW JERSEY BAR ASSOCIATION.

The annual meeting of the New Jersey Bar Association will be held at Atlantic City, at the Chelsea Hotel, June 14th and 15th.

The President's address, by Edward M. Colie, will be entitled, "The Constitutional Conscience." Other speakers will be Justice Putnam of New York, Governor Edge, Justice Pitney of the United States Supreme Court, former Attorney-General Wickersham and Job Hedges.

BOOK REVIEW

HALL'S OUTLINE OF INTERNATIONAL LAW.

The long neglected subject of international law is coming into its own. Isolated, as America has been for many years, there was no particular incentive to study this branch of the law. Practically very few lawyers had occasion to apply it, and in the few cases involving private rights, as in the Pius Fund case, lawyers who had previous diplomatic service were usually retained as counsel.

But the subject can no longer be said to be academic. During the war and, more especially, after the war, will this subject assume a position of more than slight importance to the practicing lawyer.

For this reason, the excellent elementary treatise on international law by Arnold Bennett Hall, will no doubt fill a need for the present and future time not only of students, but of practicing attorneys who neglected the subject in their college days.

The author is assistant professor of Political Science at the University of Wisconsin, and his treatise, while only an outline of the outstanding principles of international law, is a very accurate and clear summary of the law as applied between nations today.

Moreover, the appendix contains not only a complete bibliography of the subject but also all the principal arbitration treatises executed in recent years.

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HUMOR OF THE LAW.

Sir Edward Carson, in his slow, apparently lazy, way rose to cross-examine a witness whose face and nose left little room to doubt his bibulous tendencies.

"Are you a very hard drinker, sir?" asked Sir Edward, looking the man up and down.

"That's my business," came the answer.

Counsel shrugged his shoulders. "Any other business, sir?" he snapped.

A Southerner in one of the cantonments below the Mason and Dixon line, when called up for examination, was asked:

"What is your nearest living relative?"

"What you mean, 'relative, mister?" returned the recruit.

"Oh, I mean your nearest living kinsfolk."

"Wal, that's my aunt you're talking 'bout."

Several other questions were answered satisfactorily when there came:

"In case of death or accident, who shall be notified?"

"My mother," immediately from the selectman.

"But you told me just a few minutes ago that your aunt was the nearest living relative that you have," objected the officer.

"You asked me who my nearest living kin was, didn't you? Wal, that's Aunt Liz—she lives jest two miles from where I been livin'; mother lives five."—Minneapolis Tribune.

Two darkies were suing for divorce. It was necessary for the old parson who had married them to testify. He appeared and this colloquy ensued:

Judge—What's your name?

Parson—William Lewis, C. W. B. M., yoh honah.

Judge—Do you know this couple?

Parson—Yas, suh, I do.

Judge—Did you marry them?

Parson—No, suh!

Judge—Didn't you marry 'em? Why, they have proof you did.

Parson—Mebbe so, boss, but yo' see it was lak dis. Dat fellar come to me an' said he'd gib me \$2 to marry him. I sez "alright" and he went and got dat woman and brung her to de church. Just befo' de ceremony he 'low as how he ain't got but six bits to gib me. Boss, I couldn't pehform no reg'lar ceremony lak dat for a measely six bits, so I just read de Christian Endeavor pledge ober dem and turned um loose.

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
Last Resort and of ALL the Federal Courts.**

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1. Adoption—Specific Performance.—Where putative father receives illegitimate child into his home under contract to adopt him and make him an heir at law, but there was no legal contract of adoption, child's heirs at law could not maintain suit in equity to specifically enforce contract and to recover father's personal estate.—*Pair v. Pair*, Ga., 95 S. E. 295.

2. Attachment—Husband and Wife.—In action on joint note of husband and wife, in which attachment is sought, creditor establishes his right to the attachment by showing that the husband formed the intention to leave the state, without showing a like intent on the part of the wife.—*Ware v. Flory*, Mo., 201 S. W. 593.

3. Attorney and Client—Accounting to Client.—Defendant, attorney for plaintiff, an old, weak, and uninformed man, held liable for amount he owed plaintiff on account of various transactions between them; defendant never having rendered true statement of indebtedness.—*Eadie v. Johnson*, Mo., 201 S. W. 601.

4. Consent Decree.—Counsel of party, by agreeing to entry of consent decree, bound his client, and, if any of his acts were without sufficient authority, client's remedy was against him.—*Chicago & Vicinity Hungarian Benev. Soc. v. Chicago & Suburb. Hungarian Aid Soc.*, Ill., 118 N. E. 1012.

5. Impropriety.—Where an owner contracted for erection of building, and gave mortgages to secure money, there was no impropriety in her attorney's acting as attorney for contractors against bank which advanced money for construction, after his relations with the

owner, as her attorney, had ceased.—*Alliance Trust Co. v. Hubbard*, Ore., 171 Pac. 550.

6. Relation.—Although an attorney orally promised to permit his client to redeem property the attorney had purchased under tax sale, out of which the attorney's fees were to be paid, yet when the client, without offering to redeem, refused an offer from another for the full value of the property, the attorney's obligation terminated.—*Ivey v. Teichman*, Tex., 201 S. W. 695.

7. Banks and Banking—Dishonored Draft.—Where a draft and bill of lading is given to a bank by a depositor in exchange for credit, and the draft is dishonored, the bank can apply the debtor's deposits on the debt without the consent of the depositor, but not if the transaction is a sale of the shipment.—*Cochrane v. First State Bank of Pickton*, Tex., Mo., 201 S. W. 572.

8. Bills and Notes—Collateral.—Where several persons indorsed note for accommodation, which a bank accepted, requiring another indorser, the note being deposited in the bank as collateral to secure a second note for a smaller amount, the bank could not, as against the accommodation indorsers, enforce its agreement with the last indorser that the note should be a pledge also to secure a loan to him.—*Ollis v. Farmers' & Merchants' Bank*, Mo., 201 S. W. 947.

9. Evidence.—In action on note given for price of perfume sold defendants, court can infer that seller's representation it would not sell such articles to other dealers within six blocks of defendant's store was material, and that its falsity would injure defendants.—*Stevens v. Weinberg*, Mo., 201 S. W. 603.

10. Public Policy.—In a popularity contest, where company sells dealer the prices and plans with book of instructions telling that fictitious votes should be given candidates to keep up interest, notes given are vicious.—*Commercial Sec. Co. v. Archer*, Ky., 201 S. W. 479.

11. Rescission.—Where plaintiff's agents induced defendant to sign an agency contract and, under representations that other instruments then signed were duplicates of the contract, persuaded him to sign promissory notes, he was not bound, on discovery of the fraud, to rescind the contract, and his continuing under the contract did not waive the fraud.—*Pioneer Stock Powder Co. v. Goodman*, Mo., 201 S. W. 576.

12. Waiver.—The maker can insist upon the invalidity of homestead waiver embraced in an usurious contract in the hands of a bona fide holder purchased before maturity for value and without notice.—*Clark v. Bank of Thomasville*, Ga., 95 S. E. 331.

13. Brokers—Performance.—That principal who employed broker to sell lands could not sell without voluntary assent of wife does not avoid his obligation to pay broker on performance.—*Cofield v. McGraw & Garner*, Ala., 77 So. 981.

14. Carriers of Goods—Bill of Lading.—A bill of lading, covering a shipment of meat, providing that claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery within four months, is binding upon the shipper.—*Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*, Mo., 201 S. W. 623.

15.—Carmack Amendment.—In action under Carmack Amendment against initial carrier of certain interstate shipments, there could be no recovery on theory that carrier had waived provision in contract as to notice, in view of purpose of Interstate Commerce Act to prevent discrimination.—*Cudahy Packing Co. v. Chicago & N. W. Ry. Co.*, 201 S. W. 596.

16.—Evidence.—Where shipping contract provides that in case of loss or damage to goods the amount shall be computed at their value at place of shipment, admission of evidence as to their value at place of destination was error.—*St. Louis & S. F. R. Co. v. First Nat. Bank, Okla.*, 171 Pac. 467.

17.—Remedial Law.—While a statute providing a penalty for neglect of a carrier to pay a loss in due time is penal, yet it was enacted to meet a hurtful policy of delaying payment, and to that extent is remedial.—*Evans v. Atlantic Coast Line R. Co.*, S. C., 95 S. E. 335.

18. Carriers of Live Stock—Insurer.—That cattle died in stock yards during very cold weather did not effect liability of transportation insurer, where cattle died as result of injuries received in transit.—*Estes v. Hartford Fire Ins. Co.*, Mo., 201 S. W. 563.

19. Carriers of Passengers—Alighting.—Where plaintiff told motorman he would leave at next stop, and motorman slowed car, his turning and looking at plaintiff, while releasing door, was not implied invitation to alight while car was in motion and did not warrant recovery for injuries when plaintiff fell from moving car.—*Busack v. Chicago City Ry. Co.*, Ill., 118 N. E. 1041.

20. Chattel Mortgages—Deficiency on Sale.—Under chattel mortgage authorizing private sale, the mortgagor may, on breach, take possession of the property, sell it as agreed upon, pay the costs and apply the remainder of the proceeds to the diminution of the mortgage debt, and if there is a deficiency he may maintain action at law against the mortgagor or his sureties.—*Ashley & Rumelin v. Lance*, Ore., 171 Pac. 561.

21.—Variance.—Where there is a variance between the amount stated in bill of sale to secure debt and amount stated in affidavit of foreclosure, under Civ. Code 1910, §§ 3298, 3299, foreclosure is not void for that reason.—*Robinson v. J. T. Bothwell Grocery Co.*, Ga., 95 S. E. 316.

22. Commerce—Employee.—Car repairer, on car which had been used, though not exclusively, in interstate commerce, could not be said to be engaged in interstate commerce while repairing it on repair track.—*Deffenbaugh v. Union Pac. R. Co.*, Kan., 171 Pac. 647.

23.—Foreign Corporation.—Foreign corporation which shipped potatoes on consignment to factor in state, who sold them in his own name, deducted expenses and commission from proceeds, remitting balance to corporation, which had no place of business in state, was engaged in interstate commerce, and not "in business within state," so as to bar its action for balance in absence of compliance with state laws as to doing business in state.—*Tyson v. Jennings Produce Co.*, Ala., 77 So. 986.

24.—Interstate Transaction.—Proviso of Interstate Commerce Act, § 20, as amended by Act

Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, that nothing therein should deprive any holder of receipt or bill of lading of any remedy under existing law, preserved only existing rights and remedies under federal law and common law, not inconsistent with rules and regulations prescribed by the act.—*Southern Ry. Co. v. Morris*, Ga., 95 S. E. 284.

25. Compromise and Settlement—Credits.—Where illiterate person, able to contract, enters into accounting and voluntarily signs a note in settlement, the terms of which he understands, he is ordinarily bound thereby, and in the absence of fraud or mistake it is no defense to note that he failed to receive certain credits and that certain debits were unjust.—*Wilson v. Bush*, Ga., 95 S. E. 317.

26. Connecting Carriers—Hepburn Act.—Common-law action against last connecting carrier for damage to interstate shipment of freight, where such damage was caused by such carrier's negligence, is not prohibited by Act Cong. June 29, 1906, c. 3591, § 7, pars. 11, 12, known as the Carmack Amendment to the Hepburn Act, amendatory of Act Cong. Feb. 4, 1887, c. 104, § 20.—*Southern Ry. Co. v. Morris*, Ga., 95 S. E. 284.

27. Constitutional Law—Privileges and Immunities.—Rev. Codes Idaho, § 6872, making it misdemeanor for any person to pasture sheep on range previously occupied by cattle, is valid, being intended to prevent conflicts between cattle rangers and sheep herders, and not subject to attack as abridging privileges and immunities of citizens of United States.—*Omaechavarria v. State of Idaho*, U. S. S. C., 38 S. Ct. 323.

28. Contracts—Illiteracy.—An illiterate person is not bound by an instrument, which he signed in erroneous belief as to its contents, where he was induced to do so by misrepresentation of other party, whose good faith he had no reasonable ground to suspect.—*Wilson v. Bush*, Ga., 95 S. E. 317.

29.—Fraud and Mistake.—Where there is a contract for a warranty deed, the acceptance of a warranty deed from a third party remits the acceptor to his covenants in his deed, and he cannot recover on the contract on account of failure of title by reason of a forged deed in the chain of title, in the absence of fraud or mistake.—*Frisbie v. Scott*, Mo., 201 S. W. 561.

30.—Mutuality.—Contract signed by both seller and buyer reciting sale of feed to buyer, and containing formula for feed and minute shipping directions, is not lacking in mutuality, though not reciting in express words that buyer agreed to accept and pay for the feed.—*Heffernan v. Neumond*, Mo., 201 S. W. 645.

31.—Public Policy.—In a popularity contest, where company sells dealer the prizes and plans, with book of instructions telling that fictitious votes should be given candidates to keep up interest, the transaction is vicious, and the court will not help either the contest company or the dealer.—*Commercial Sec. Co. v. Archer*, Ky., 201 S. W. 479.

32. Conversion—Equity.—At death of landowner who had given bonds for deed to two purchasers, equitable title to tracts was not in original owner, but in vendees under doctrine of equitable conversion.—*Ward v. Williams*, Ill., 118 N. E. 1021.

33. Corporations—Evidence.—Document signed by president and secretary and attested by seal of corporate beneficiary of life policy is not conclusive evidence of officers' power to execute instrument.—*Coleman v. Northwestern Mut. Life Ins. Co., Mo.*, 201 S. W. 544.

34.—Evidence.—Evidence that president and secretary of corporate beneficiary of life policy executed instrument changing beneficiary, and that corporation's directors and stockholders individually consented to such action, does not establish, as matter of law, the corporation's consent to such change.—*Coleman v. Northwestern Mut. Life Ins. Co., Mo.*, 201 S. W. 544.

35.—Foreign Corporation.—Resident manager of foreign corporation empowered to make sale contracts with local agents subject to approval of his principal under Comp. Laws 1913, § 6340, was authorized to bind his principal by agreement to pay commission to one bringing in a customer.—*Kopan v. Minneapolis Threshing Mach. Co., N. D.*, 166 N. W. 826.

36.—Lien on Stock.—Where one extends credit on security of stock, without notice of by-law in favor of issuing corporation, and obtains judgment against pledgor and buys stock at sheriff's sale, his lien is superior to corporation's lien, and it cannot refuse to transfer stock to him notwithstanding his notice of by-law lien at sale.—*American Nat. Bank of Atlanta v. East Atlanta Bank, Ga.*, 96 S. E. 286.

37.—Prospectus.—Prospectuses and maps used in procuring subscriptions to stock of a corporation held admissible in actions on such subscription contracts in support of the defense that they were obtained by fraudulent representations.—*Columbia-Knickerbocker Trust Co. v. Abbot, U. S. C. C. A.*, 247 Fed. 833.

38. Customs and Usages—Evidence.—Where seller contracted absolutely to sell stipulated kind of feed, he cannot, his mill having been destroyed by fire, escape liability on ground of trade custom to excuse manufacturers in event of that contingency, for such custom or contingency was not expressed in the contract.—*Heffernan v. Neumond, Mo.*, 201 S. W. 645.

39. Disturbance of Public Assemblage—Evidence.—Defendant held not guilty of violating Pen. Code 1910, § 412, as to disturbing public worship, where he used no profane and obscene language, but merely protested against abuse of himself and his followers, who had come to the meeting house expecting to hear him preach.—*Jackson v. State, Ga.*, 95 S. E. 302.

40. Easements—Right of Way.—Instrument giving adjoining landowner, and her heirs forever, right of way in stairway in grantor's building and referring to privileges as an easement appurtenant to grantees' property, conveyed no estate which survived building's destruction by fire.—*Cohen v. Adolph Kutner Co., Cal.*, 171 Pac. 424.

41. Equity—Clean Hands.—Maxim that party must come into equity with clean hands does not preclude right to accounting, because complainant was alleged to have forged evidence supporting certain items of her claim.—*Barnes v. Barnes, Ill.*, 118 N. E. 1004.

42. Estopped—Unrecorded Conveyance.—Where daughter and her husband conveyed unimproved lot to her mother and took back a deed, the deed to the mother being then recorded, but deed from mother not being recorded until 19 years later, 2 years after levy of attachment in action by contractor for unpaid balance on house on the lot under contract with mother, daughter was estopped to assert ownership under unrecorded deed.—*Slinger v. Sterrett, Ill.*, 118 N. E. 1008.

43.—Guaranty.—If manufacturer of roofing assured contractor that rafters in new building were sufficient to carry load of roofing, doing

so to get contract to supply roofing, in owner's action against it on guaranty of roofing, it cannot be heard to say rafters were not sufficient.—*Daly v. Cementile Roofing Co., S. C.*, 95 S. E. 333.

44. Executors and Administrators—Assets.—The term "assets," as applied to decedent's estates, means property, real or personal, tangible or intangible, legal or equitable, which can be available for or can be appropriated to the payment of debts.—*Barnard v. Bilby, Okla.*, 171 Pac. 444.

45. Factors—Commission.—Where plaintiff wired factor asking whether he could sell potatoes at 81 cents, and he replied, "Can sell at 81, competitors offering at 76," intending to say "Can't sell at 81," and potatoes were shipped and sold at less than 81 cents, plaintiff could recover difference in balance due, after deduction of proper commission, between price of 81 cents and actual selling price.—*Tyson v. Jennings Produce Co., Ala.*, 77 So. 986.

46. False Pretenses—False Representations.—Under an information for obtaining money by false pretenses, in that defendant falsely represented that mining property contained a "vast quantity of pay ore," evidence of acreage of claim, improvements, personal appearance, and innocent expression of defendant and his beguiling smile was admissible.—*People v. Donaldson, Cal.*, 171 Pac. 442.

47. Food—Intent.—Though intention is immaterial in determining whether there was violation of a pure food statute, the intent of a buyer of feed who expected to resell is material in determining whether the contract was tainted with illegality.—*Hefferman v. Neumond, Mo.*, 201 S. W. 645.

48. Frauds, Statute of—Acceptance.—Where written contract of employment for year was made in preceding year, oral agreement made at same time to pay certain extra expenses in case commission on sales for year did not amount to enough to pay same, could not be enforced where there was no acceptance by the employer within the year referable to anything but the written contract, in view of Rev. St. 1909, § 2783.—*Johnson v. American Paper Products Co., Mo.*, 201 S. W. 651.

49.—Performance.—Where plaintiff fully performed her oral contract to render services to one upon a promise of compensation by legacy, and services were accepted by the other party, contract was not within statute of frauds (Civ. Code 1910, § 3223, subds. 2, 3).—*Alford v. Davis, Ga.*, 95 S. E. 313.

50. Guardian and Ward—Conflicting Interests.—Where money paid to the guardian from the sale by court order of lands in which wards were remaindermen, for attorney's fees, lands sold wards' father and repayment of loan, all came from the father's life estate, there was not such conflict in interest as would avoid such sale.—*Dole v. Shaw, Ill.*, 118 N. E. 1044.

51.—Fraud.—Where guardian sells ward's land on secret understanding that purchaser will not pay therefor, and sale is confirmed and deed delivered, there is a fraud upon the ward, who, by action against purchaser or anyone acquiring land with knowledge of such fraud may set sale aside.—*Langley v. Ford, Okla.*, 171 Pac. 471.

52. Gifts—Shares of Stock.—Where a father had shares of stock issued to his son on the books, and mailed him notice of a stockholders' meeting, his retaining the stock and attempting to vote it in his son's absence, without proxy, did not show as a matter of law that there was no delivery.—*Jones v. Jones, Mo.*, 201 S. W. 557.

53. Highways—Drainage.—Gen. St. 1915, § 3896, does not give drainage district power to regulate construction of highways and culverts within district, but such power over township highways is vested by section 8765 in township officers; and district cannot maintain mandamus to compel such officers to construct highway culverts to operate as dams and sluiceways.—*The Maple Grove Drainage Dist. v. Hicks, Kan.*, 171 Pac. 613.

54.—Obstruction.—Defendant, who had daily stationed his wagon in public road, placed peanut roaster and gasoline engine in road, and arranged fruits and drinks about his wagon, was

properly enjoined from obstructing public road.—*Rider v. Porter, Ga.*, 95 S. E. 284.

55. Insurance—Classification in Risk.—Provision in policy that in case of accident in more dangerous work or risk benefits would be payable according to classified tables for such increased hazard applies to occupations, and therefore under superintendent of city school killed in vacation while cutting down a tree did not change his occupation, so as to classify as more hazardous risk.—*Evans v. Woodman Acc. Ass'n, Kan.*, 171 Pac. 643.

56. Medical Services.—Anyone who pays for medical services for a servant may recover from the insurer, under Vernon's Sayles' Ann. Civ. St. 1914, art. 5246k.—*American Indemnity Co. v. Nelson, Tex.*, 201 S. W. 686.

57. Restriction on Liability.—An insurance policy, with rider, restricting insurance to legal liability of insured for failure correctly to notify owner of goods of warehouse in which placed, but restricted to certain warehouses, does not cover loss of goods reported to owner as in one of them, but stored in another not included in policy.—*Bush Terminal Co. v. Globe & Rutgers Fire Insurance Co. of City of New York, N. Y.*, 169 N. Y. S. 734.

58. Intoxicating Liquors—Bone Dry Law.—An indictment, under the "bone dry law," approved March 28, 1917 (Laws 1917 [Extra Sess.] p. 6), alleging defendant's possession of intoxicating liquor, need not set out the specific quantity in his possession.—*Harris v. State, Ga.*, 95 S. E. 321.

59. Prohibition District.—In county in which sale of liquor had not been prohibited, containing municipality in which licenses were issued and in force, neither part of county outside municipality nor any precinct outside municipality was a "prohibition district," as defined by Laws 1913, c. 27, § 7, so as to make defendant's sale illegal.—*State v. Morton, Idaho*, 171 Pac. 495.

60. Landlord and Tenant—Common Courts.—Where landlord corporation agreed to reimburse corporation tenant for improvements put on premises, tenant or termination of lease could recover value of improvements under common counts, but could not recover enhanced value of the land.—*United States Brewing Co. v. Dolore & Shepard Co., Ill.*, 118 N. E. 1006.

61. Improvements.—Where tenant makes valuable, permanent improvements on farm which landlord agrees to pay for when tenancy is terminated, tenant's right to reimbursement is sufficiently mature to justify his cause of action when landlord leases farm and lets another tenant into part possession.—*Henshaw v. Smith, Kan.*, 171 Pac. 616.

62. Libel and Slander—Constitutional Law.—Const. art. 2, § 14, guaranteeing privilege of saying, writing and publishing whatever citizen desires, subject to liability for any abuse, and providing that in all suits and prosecutions truth may be given in evidence, applies to actions for slander of title.—*Nat. L. McGuire Oil & Supply Co. v. Marvin, Mo.*, 201 S. W. 628.

63. Mandamus—Drainage.—Mandamus will issue to compel drainage commissioners to levy assessment to pay judgment against district, although no district bonds had been issued for that purpose.—*Allen v. Commissioners of Muddy Creek Drainage Dist., N. C.*, 95 S. E. 170.

64. Marriage—Police Power.—State has right to control and regulate by reasonable laws marriage relationship of its citizens and wishes and desires, or even immediate welfare of individual must yield to public policy of state; hence marriage of epileptic may be annulled over his objection.—*Kitzman v. Kitzman, Wis.*, 166 N. W. 789.

65. Master and Servant—Hazardous Occupation.—Cleaning and washing of windows is hazardous occupation, and is, under Workmen's Compensation Act, included in the business of "maintaining" any structure.—*Chicago Cleaning Co. v. Industrial Board of Illinois, Ill.*, 118 N. E. 989.

66. Independent Contractor.—Messenger for telegraph company who furnished his own bicycle and uniform, and took his own routes at his own speed, and was paid two cents for each message delivered, was servant, and not an inde-

pendent contractor.—*Postal Telegraph-Cable Co. v. Murrell, Ky.*, 201 S. W. 462.

67. Negligence.—Where wobbling and vibration of shafting had existed for nine months or longer, the failure to discover it or correct it when known was negligence.—*Clark-Pratt Cotton Mills Co. v. Bailey, Ala.*, 77 So. 995.

68. Parent and Child.—In action for wrongful death of plaintiff's intestate, where right to recover depended upon negligence of father in permitting his 13-year-old son to drive, and on son's negligent driving of automobile, verdict finding such death not due to negligence of son is conclusive as to the father.—*Taylor v. Stewart, N. C.*, 95 S. E. 167.

69. Prima Facie Negligence.—Where plaintiff, a servant, is injured while working about slides, ropes, and tipples used in handling slabs, the work being under defendant's management, and the accident being such as does not ordinarily happen when those in control use proper care, a *prima facie* case of negligence is made out.—*Kilpatrick v. Kinston Mfg. Co., N. C.*, 95 S. E. 168.

70. Proximate Cause.—Though brakeman killed in rear-end collision was negligent in failing to go back to warn following train, yet, as company was negligent, it cannot be declared as a matter of law that proximate cause of death was brakeman's contributory negligence, and that under Act April 22, 1908, c. 149, § 1, it did not result in part from negligence of any employee of company.—*Union Pac. R. Co. v. Hadley, U. S. S. C.*, 38 S. Ct. 318.

71. Relief Association.—Where there was no provision in certificate, constitution, or by-laws of railroad employees relief association, prohibiting admission of non-members, and association was able to secure service of competent surgeons at small salaries by allowing them to take non-members in association hospital and collect from them fees for services, such receiving of non-members was not *ultra vires*.—*Denver & R. G. R. Co. Employees' Relief Ass'n v. Rishmiller, Colo.*, 171 Pac. 501.

72. Respondent Superior.—Where window cleaner not discharged, although told not to work when unable, and unpaid for some work done, took his tools, and assignment of his place to work placed in his locker by employer, which he proceeded to execute, relation of master and servant obtained, for purpose of compensation.—*Chicago Cleaning Co. v. Industrial Board of Illinois, Ill.*, 118 N. E. 989.

73. Safe Place to Work.—Where contractors' carpenter on building was injured by giving way of wall erected by another contractor, rule relieving master from liability for unsafe place of work, where conditions are constantly shifting, did not apply, where only change in conditions was that caused by progress of carpenter's work.—*Bidwell v. Grubb, Mo.*, 201 S. W. 579.

74. Workmen's Compensation Act.—Under Workmen's Compensation Act, § 5, subd. 2, and Child Labor Act, §§ 1, 4, 11, a minor between the ages of 14 and 16, who was working in a manufacturing establishment without required permit, is not an employe, within Workmen's Compensation Act, and, where injured while operating prohibited machinery, may recover at law for injury.—*Roszek v. Bauerle & Stark Co., Ill.*, 118 N. E. 991.

75. Workmen's Compensation Act.—Evidence that brickmaker, previously in good health, when attacked by vertigo or some similar disorder while on brick pile some 15 feet above ground, fell and was injured, held to sustain Industrial Commission's finding that his injury was accidental, within Workmen's Compensation Act.—*Santacroce v. Sag Harbor Brick Works, N. Y.*, 169 N. Y. S. 695.

76. Mortgage—Foreclosure.—Where mortgage provided that mortgagors should reduce a prior incumbrance, and that failure to perform any agreement should authorize immediate foreclosure, act of mortgagor in procuring a receipt from the administrator of the estate which owned the prior incumbrance, but paying no money therefor, and without exhibiting the receipt to either the mortgagee or his assignee, was not such performance as to prevent foreclosure.—*Churchill v. Meade, Ore.*, 171 Pac. 565.

77.—**Substituted Trustee.**—Provision of deed of trust that, if trustee or any substituted trustee should refuse to execute the trust, the beneficiary or his assignee, or their legal representatives, might appoint another trustee, authorized corporate assignee of the deed of trust to appoint a substituted trustee where the then acting trustee refused to act.—West v. Union Naval Stores Co., Miss., 77 So. 961.

78. **Municipal Corporations—Abutting Owner.**—Where paving ordinance of city of Macon was invalid, because not presented to mayor for his approval, as required by section 24 of its charter, abutting owner was not estopped to deny want of jurisdiction, though he made no objection to paving.—Hall v. City of Macon, Ga., 95 S. E. 248.

79.—**City Park.**—A union depot company owning and operating a station, abutting a regularly dedicated city park on which it has, under agreement with the city, spent thousands of dollars for grading, fencing, and beautifying, is entitled to injunction against appropriation of any part thereof for sidewalk purposes.—El Paso Union Passenger Depot Co. v. Look, Tex., 201 S. W. 714.

80.—**Contributory Negligence.**—That occupants of buggy might have seen approaching automobile which had turned obliquely to wrong side of street to avoid collision had they looked held not to constitute contributory negligence as matter of law.—Oberholzer v. Hubbell, Cal., 171 Pac. 436.

81.—**Governmental Power.**—One injured when municipal garbage wagon struck ladder on which he was working could not recover damages therefor from city, as it was in the exercise of a governmental power.—Behrmann v. City of St. Louis, Mo., 201 S. W. 547.

82.—**Negligence Per Se.**—Although driving of an automobile upon street by minor of 13 years, in violation of law, is negligence per se, it is for jury to determine if such negligence was proximate cause of injury or death.—Taylor v. Stewart, N. C., 95 S. E. 167.

83.—**Non-User.**—The rights, duties, and privileges conferred and imposed upon a municipal corporation by dedication exclusively for the public benefit cannot ordinarily be lost through non-use or laches.—Board of Com's of Douglas County v. City of Lawrence, Kan., 171 Pac. 610.

84.—**Traffic Ordinance.**—A traffic ordinance providing that driver of vehicle shall keep six feet on right side of running board of street car held not applicable to running board on left side of car, and such ordinance was irrelevant in action for injuries to passenger alighting on left side of car.—Santina v. Tomlinson, Cal., 171 Pac. 437.

85. **Negligence—Jury.**—Whether plaintiff, a boy of ten of average intelligence, who, while attending automobile races, occupied a dangerous place, after repeated warnings of danger, was guilty of contributory negligence, preventing recovery for being struck by racing automobile, held a question for the jury.—Scott v. Kansas State Fair Ass'n, Kan., 171 Pac. 427.

86.—**Licensee.**—Where building owner requested construction company to repair outside curb, its employee, who went into open stair well while going to basement for water, which he might have secured elsewhere, exceeded bounds of the invitation and was a mere licensee.—Shuck v. Security Realty Co., Mo., 201 S. W. 559.

87. **Officers—De Facto.**—A de jure officer who has been for time wrongfully prevented from discharging the duties of his office cannot recover from state salary for such time when it has been paid to a de facto officer, who discharged duties of position during period when de jure officer was prevented from discharging them.—People v. Burdett, Ill., 118 N. E. 1009.

88. **Parent and Child—Automobile.**—Where defendant's automobile driven by his son was being used under defendant's authority for family purposes, he was liable for the negligence of the son in inflicting a personal injury.—Uphoff v. McCormick, Minn., 167 N. W. 788.

89. **Payment—Implied Warranty.**—Purchaser of automobile for \$650, who engaged to pay with "Constitutionalists' money" at 20 cents on dol-

lar, impliedly warranted money paid by him was valid currency of particular sort, and in seller's action to recover title and possession, in alternative for price with foreclosure of lien, it is immaterial whether there were any representations as to genuineness of the money.—Reeves v. Avina, Tex., 201 S. W. 729.

90. **Railroads—Licensee.**—As to licensee walking on path beside its track, defendant was not bound to anticipate that she would instantly move from place of safety to place where step of coach of passing train would strike her.—Gordon v. Atlantic Coast Line R. Co., Ga., 95 S. E. 311.

91.—**Proximate Cause.**—Negligence of railroad in failing to keep flagman at crossing was proximate cause of injuries to boy when he backed into passing freight train, in endeavoring to avoid another engine approaching on another track.—Houston & T. C. Ry. Co. v. Roberts, Tex., 201 S. W. 674.

92. **Sales—Breach of Warranty.**—In action for breach of warranty, plaintiff must show that the warranty was relied on and that it was an operative cause, although it need not have been the sole inducement.—Feeney & Bremer Co. v. Stone, Ore., 171 Pac. 569.

93.—**Express Warranty.**—In case of executed sale by seller who is neither manufacturer or grower of ascertained and existing chattel open to inspection, if an express warranty is not given, and purchaser exercises without hindrance right of inspection, *caveat emptor* applies.—Dishman v. Griffis, Ala., 77 So. 961.

94.—**Fraud.**—In buyer's action for damages from sale of grain to which seller had no title, evidence as to fraud in execution of land sale contract was inadmissible, where parties were strangers to the contract and both derived title to claim from purchaser, who had not attempted to avoid contract for fraud.—Farmers' Equity Exch. v. Blum, N. D., 166 N. W. 822.

95.—**Illegality.**—While it is a good defense to a contract valid on its face that it was intended by contracting parties to violate law in performance thereof, a buyer of feed for resale cannot be denied relief on account of seller's non-performance, unless it was his intention in disposing of feed to violate law.—Heffernon v. Neumond, Mo., 201 S. W. 645.

96.—**Variance.**—In suit for price of building materials bought by defendant on account, proof that materials were sold to defendant's contractor and of defendant's subsequent oral promise to pay was properly excluded because at variance with and not authorized by petition.—Johnson Lumber Co. v. Weems, Ga., 95 S. E. 310.

97. **Shipping—Breach of Warranty.**—Where the managing owner of a vessel, in name of partnership of which he was member, signed charter party, he cannot escape liability for breach of warranty of seaworthiness, under Act June 26, 1884, § 18, providing for limitation of shipowner's liability, for the contract was personal as to such owner and did not fall within statute.—Pendleton v. Banner Line, U. S. S. C., 38 S. Ct. 330.

98. **Trusts—Evidence.**—An amended petition, alleging that an attorney who had purchased property sold for taxes, had done so as to retain it for his client, defendant, but which fails to allege defendant's ownership and right of possession, or any consideration for the agreement, does not show an enforceable trust.—Ivey v. Teichman, Tex., 201 S. W. 695.

99. **Waters and Water Courses—Appropriation.**—Where plaintiffs had always used the natural water of a stream, but the stream had been augmented by foreign waters deposited in it by a city, such foreign waters constituted abandoned personality and defendants, who first appropriated them had the right to their use.—E. Clemens Horst Co. v. New Blue Point Mining Co., Cal., 171 Pac. 417.

100. **Wills—Attestation.**—Ky. St. § 4828, requiring name of testatrix to be subscribed to will, was sufficiently complied with by subscriber, "Nancy Wilson X Whaley," instead of testatrix's correct name, Nancy Wilson Hendrix, where identity of testatrix was not questioned.—Reed v. Hendrix's Ex'r, Ky., 201 S. W. 482.

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STATE STATUTE OR CITY ORDINANCE AS EVIDENCE OF NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT.

In McLain v. Chicago & Gt. Western R. Co., 167 N. W. 349, decided by Supreme Court of Minnesota, it was held that a city ordinance prescribing speed limits within the city for the running of trains was not admissible in evidence for defendant railway in a suit wherein it was claimed that plaintiff, a passenger train engineer, was guilty of contributory negligence. There was dissent by one judge.

The prevailing opinion speaks of the Act of Congress superseding all state laws upon the subject of liability of a carrier in interstate commerce to its employees.

It is said "The act (of Congress) covers the entire field under which the employer in interstate commerce shall be liable for injury to the employes likewise engaged. It pertains solely to the relation of master and servant. It does not supersede state legislation outside of this field, nor does it deal with the duties or obligations of either with the public, but it does supersede all state and municipal legislation governing the circumstances under which the master, while within the provision of the act, shall be liable for injury to the servant. It follows that the ordinance is superseded by the Act of Congress and was not admissible in evidence."

There seems something lacking in persuasiveness to the conclusion just stated. The dissenting opinion, which is very brief, quite strongly suggests the weakness of this reasoning.

Thus the dissent says: "It is the law of the federal jurisdiction that reasonable municipal regulation of the speed of interstate trains is a valid exercise of the police power to which the interstate carrier is obliged to conform." * * * It has also been for a long time the law of the federal jurisdiction that the violation by a carrier of a reasonable speed ordinance is evidence of negligence in the operating of a train. Grand Trunk Ry. Co. v. Ives, 141 U. S. 408. In my opinion the Federal Employers' Liability Act did not change these principles of law. Under that act the federal law is permanent and exclusive in determining what is negligence and contributory negligence. These terms are not defined in the act. * * * Now as before local police regulation which the interstate carrier is bound to obey must be taken into account. Federal law prevails, but this is federal law."

If we take it that the common law is to be applied to the Federal Employers' Liability Act as that is applied by federal decision, yet that common law is to be applied to the circumstances of a transaction. If an ordinance under police power may create a situation which carrier as well as employe is to recognize, why should not such ordinance be evidence to explain an act or acts by a business subject to police power?

Thus suppose an employe in charge of a train, as engineer, is running through a city with no speed ordinance, does it not seem clear, that the conduct of the engineer has a different aspect, than were he violating no ordinance in another city? The situation in the latter city has an element injected into it which does not exist in the other city. It colors his conduct. It amounts, presumptively, to a disobedience of directions on the part of his employer. It is some evidence of negligence and of willfulness as well.

It goes even further than this. It warns the engineer that he will probably encounter

danger ahead, and that he is bound to exercise special care for his own sake and the sake of the public at large. It is not to be presumed, that the ordinance only was looking out for safety of a carrier's employes. The public is interested in all, and it also is interested in the preservation of the property of an interstate utility.

Why is it not true, as the dissent well says, that to take all of those things into account is "federal law?" Federal law is not operating in states in utter disregard of all local rights. It enjoins upon the carrier scrupulous regard for police power there properly declared. Whether disregard by the employe of the special ordinance is negligence *per se*, we do not here discuss. We concede, however, this would be a thing for federal decision to declare. But that the ordinance is not admissible as tending to show contributory negligence seems to us by no means clear.

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE—SAFEGUARDS FOR CHILDREN AGAINST ATTRACTIVE LURES.—In McLendon v. Hampton Cotton Mills Co., 95 S. E. 781, decided by the Supreme Court of South Carolina, it was held as matter of law, that a four-foot woven wire fence around a reservoir, though easy to climb, was a sufficient safeguard so as not to make company maintaining same responsible for the death of a six and a half year old child climbing the fence and being drowned in the reservoir.

This ruling was by a majority of three to two reversing the judgment finding liability.

The prevailing opinion speaks of normal children for whom such a barrier would be sufficient as a safeguard and those "abnormally mischievous and disobedient." "The landowner," says the court, "is not bound to erect a barrier, which no child can overcome, but only such as is sufficient to safeguard the child of ordinary and normal instincts and training."

The minority opinion does not reason about normal and abnormal children, and very right-

ly, it seems to us, does not class mischievousness as a sign of abnormality. Entire absence of that would for us tend rather to prove an abnormal child. A lure, if it is a lure, might be an aggravation to childish instincts if not thoroughly guarded against. At all events, it seems to us, that it is more a question of fact as to what is a sufficient safeguard, than a question of law, and we deprecate any rule that recognizes responsibility for maintaining a lure for children and then distinguishes their instincts in the way this court does.

The minority opinion well says that: "If a safeguard, it was because the fence was notice to the child or a hindrance to the child; in no other respect could it be a safeguard. To a child of six years it was no notice at all; the child would not know what the fence was put there for, except perhaps a thing to play upon," and "it was no hindrance; it was rather an invitation to climb." At all events, we have never heard that "*capax doli*" necessarily displaces childish instincts or distinguishes between attractive lures.

STATUTE OF LIMITATIONS—RIGHT OF FEDERAL COURT SITTING IN EQUITY TO DISREGARD.—In Humphreys v. Walsh, 248 Fed. 414, decided by Third Circuit Court of Appeals, the rule of a federal court in equity actions not being bound to apply the doctrine of laches as presented by state statutes of limitation, as applied in cases at law, notwithstanding the time fixed by such statutes has not expired, is extended to cover a case, where such a statute expressly provides an exception to the application thereof.

The court said: "In applying the doctrine of laches in equity actions, it must first be observed that Federal Courts are not bound by statutes of limitations of the former even when they are applicable by their terms to such actions. (Citing Supreme Court cases.) Federal Courts pursue their own rules of equity procedure and enforce the doctrine without regard to, and, in instances, even within the period of an applicable statute of limitations (citing one C. C. A. case). It is not necessary to discuss here the reasons that control Federal Courts in thus broadly enforcing the doctrine. These are briefly and sufficiently given with supporting cases in 10 R. C. L. 395-408. The Supreme Court of the United States has repeatedly stated and fully established the scope of the equitable defense of laches when offered in applicable state statutes of limitations as enforced by Federal Courts. * * * * If the limitation of an applicable

state statute yields to the doctrine of laches as applied by Federal Courts, an exception of a statute saving the right of action, also must yield, for, as in this instance, the exception is not available, when the statute itself falls before a doctrine with which it is in conflict."

In this case plaintiff brought suit on a demand more than thirty years old and more than fifteen years after death of the maker of the note, the operation of which the state statute suspended by exception and saved the right of action during the non-residence of obligors in the situation of this maker. The court held that, though, if plaintiff were suing in law his action would not be barred, yet in Federal Courts by laches he was barred.

Here it would seem was a mandatory provision by statute over a situation the state had the right to legislate about, and yet a Federal Court refuses to apply the statute.

Conceding that the doctrine of laches has been applied as declared, yet it must be admitted that this goes so counter to the principle of Federal Courts respecting state statute law, that the principle ought not to be extended beyond what is absolutely clear.

Besides, it is not altogether clear that the conclusion the Circuit Court of Appeals deduces is certain. Federal Supreme Court was holding along lines of general jurisprudence. It was not intending to go into the very teeth of state law. It was itself considering an exception within a statute raised by the doctrine of laches. It was not refusing to give any force to the statute. In this case the court refused to give state law any consideration at all so far as the exception was concerned.

Furthermore, the Supreme Court has always regarded that well settled decision by states constitutes a rule of property, and positive unequivocal statute ought to be as valid as settled decision. Ought ever a lower Federal Court to extend such a rule as the Supreme Court has declared?

INDIAN COUNTRY—RIGHT OF WAY TO RAILROAD WITHIN.—In U. S. v. Goldana, 38 Sup. Ct. 357, decided by U. S. Supreme Court, it was held, that, as act of Congress creating Crow Indian Reservation and granting to a railroad right of way through the reservation was to work forfeiture of all privileges upon breach of certain conditions, the grant did not extinguish Indian title and only conveyed an easement or a limited fee, leaving such right of way in Indian country and the introducing

of intoxicating liquors thereon was an offense under the act forbidding such introduction within the exterior boundaries of such reservation.

The introduction in this case was on the platform of a railroad company, and it was contended that the Indian title on the right of way had been extinguished. The court asked: "Did the statutes except from the reservation the land on which the railroad was built and extinguish the Indian title or did they merely give to the company a right of way or other limited interest in the land on which to construct and operate a railroad?"

It was said: "To have excepted this strip from the reservation would have divided it into two, and would have rendered it much more difficult, if not impossible, to afford that protection which the statutes were designed to secure." A prior case is referred to and distinguished because it involved a statute which extinguished the Indian title. Clairmont v. U. S., 225 U. S. 551.

The difficulty in applying statutes barring introduction of intoxicating liquor into Indian country, by the grant to a railroad of a right of way through a reservation, is readily appreciated and, on general principles, one would suppose, that, even if Indian title were extinguished by a grant from the government through a reservation, it ought not to operate to excuse one selling liquor thereon. But it may be that such a construction might be indulged on the theory that a criminal statute is to be taken in *favorem libertatis*, which view the easement or conditional fee theory is sufficient to displace. This looks though like a "narrow squeak" for holding one charged with crime.

CARRIERS OF LIVE STOCK—CONSTRUCTION OF THE THIRTY-SIX-HOUR STATUTE.—The first case in the Supreme Court on the Act of Congress in 1906, to prevent cruelty to animals while in transit, and which forbids carriers to confine animals in cars longer than thirty-six hours, is that of Chicago & N. W. Ry. Co. v. United States, 38 Sup. Ct. 351, the opinion of which was handed down April 15, 1918. Justice McReynolds wrote the opinion, and very clearly defines what shall and what shall not excuse the carrier for violation of this Act.

In this case the cattle were loaded on cars at Ringsted, Iowa, destined for the Union Stockyards, Chicago. They were loaded at 6 P. M., October 4th, and arrived at Chicago October 6th at 9 A. M., thirty-nine hours and

five minutes after being loaded. There was evidence to show that the usual schedule for freight trains for that distance was less than thirty hours. The delay in this case, however, occurred while the train was passing through the town of Proviso, sixteen miles from Chicago: a drawbar dropped out, derailing one of the cars.

In the lower court the jury found the defendant guilty, and the judgment was confirmed by the Circuit Court of Appeals. In reversing this judgment, Justice McReynolds calls attention to the error of the presiding judge in instructing the jury on the question of due diligence, in which the court defined the term as meaning "whatever ingenuity human intelligence could devise and put in operation, having in mind the practical operation of a railroad, and having in mind the purpose which the law has, to get stock to market within the time mentioned."

Justice McReynolds said

"We find nothing in the Act indicating a purpose to interfere directly with the carrier's discretion in establishing schedules for trains; the design was to fix a limit beyond which animals must not be confined, whatever the schedule, except under the extraordinary circumstances stated. In general, unloading can only take place at specially prepared places or final destination. If in the exercise of ordinary care, prudence and foresight the carrier reasonably expects that following the determined schedule the containing car will reach destination or some unloading place within the prescribed time it properly may be put in transit. Thereafter the duty is on the carrier to exercise the diligence and foresight which prudent men, experienced in such matters, would adopt to prevent accidents and delays and to overcome the effect of any which may happen—with an honest purpose always to secure unloading within the lawful period. If, notwithstanding all this, unloading is actually prevented by storm or accident the reasonable delay must be excused."

In remanding the case back to the trial court for a new trial, Justice McReynolds calls the attention of the trial court to the construction of the Hours of Service Act, which it says is analogous, especially to the decision of the Supreme Court in the case of *Atchison, Topeka & Santa Fe Ry. Co. v. United States*, 244 U. S. 336, where it was said:

"It was not the intention of the proviso, as we read it, to relieve the carrier from the exercise of diligence to comply with the general provisions of the Act, but only to relieve it from accidents arising from unknown causes which necessarily entailed overtime employment and service. *United States v. Dickson*, 15 Pet. 141. It is still the duty of the carrier to do all reasonably within its power to limit the hours of service in accordance with the requirements of the law."

REORGANIZATION OF THE JUDICIAL ADMINISTRATION OF JUSTICE*.

The fundamental reform about which there has been but little discussion which in importance overshadows all others, is the improvement in organization of our entire judicial department and our methods of selecting and retiring judges.

This reorganization of our courts can only be accomplished by a complete and consistent scheme, by which the whole judicial power of the state shall be vested in one great court, of which all our judicial tribunals shall be branches, departments or divisions. Until this principle of unified state courts is recognized and carried into effect, all our efforts to secure judicial reform will prove unsatisfactory and disappointing.

The system under which our courts were originally organized may have proven adequate for frontier states, where population was scant and confined to rural districts, where travel and communication was slow and difficult, where commerce and industry were undeveloped and the legal problems were simple and confined to those which naturally arose in an agricultural community where primitive social conditions prevailed. But with the growth of wealth and population, these primitive conditions have long ceased to prevail, and yet we are relying on court organizations, created to meet the simple demands of a frontier state for the solution of many intricate problems, the increased litigation, and the law requirements of a highly complex and advanced civilization.

*This article, by Gov. O'Neal of Alabama, is a remarkably accurate restatement of the principal reforms in the administration of justice now advocated by leaders of the bar and supported by the recommendations of the American Bar Association. It is, in substance, part of an address by Gov. O'Neal at the last meeting of the Alabama Bar Association, which has been revised for the purpose of this article.—Editor.

The organization of our courts remains the same it was in the days following the American revolution and we still continue to administer justice under rules of practice and procedure adopted and suited to the times of the Tudors and the feudal ages. As our wealth and population increased, as our manufacturing, industrial and commercial interests were developed and expanded, and our villages grew into towns and populous cities, and new and intricate legal problems arose, and the dockets of our courts became crowded and congested with civil and criminal cases, instead of reorganizing our judicial system to meet the new conditions, which modern civilization produced, our legislature simply "spawned out new courts." That the spawn was too prolific we shall later proceed to demonstrate. These new courts were separate and independent administrative units. There was no responsible head of our judicial system, no superintendent clothed with the power to supervise the operation of the different courts, to suggest and secure reforms, or speed the judicial machine to the highest point of efficiency.

Administrative Organization.—Our present system lacks a head. There is no one with authority to act as superintendent, to gather statistics, to inspect judicial transactions, to watch the trial cases, and the practical workings of the court, to observe their failure or weakness and to suggest improvements. If there is a miscarriage of justice, due either to the incompetency of the judge, the practice and procedure, the faulty organization of the business side of the court, lack of proper clerical aid, neglect of duty by court officials, and other causes, there is no one clothed with power or authority to make report or criticism, to suggest improvements or prevent the recurrence of similar failures in the administration of the law. An able and earnest law writer was so impressed with this condition, that in the journal of the American Judicature Society, he recently wrote a con-

vincing plea for the creation of a chief judicial superintendent. In California his ideas have been literally indorsed by the proposal to create a commissioner of justice, who would be a judicial superintendent, but without machinery to enforce his recommendations.

The delay as well as the expense in the trial of civil and criminal cases, due largely to our unscientific type of court organization and to rigid rules of practice and procedure formulated by the legislature, instead of by the courts, the thousands of petty, frivolous and unfounded prosecutions in misdemeanor cases, inspired by the fee system, which clog the dockets of our criminal courts, have all become a growing evil and challenge the consideration of the bar and of all who are interested in giving the state a more economical and speedy administration of our civil and criminal laws.

Reforming Jurisdiction and Organization of Courts.—The remedy then for these conditions is the reform of the jurisdiction and organization of our courts. The English Court Reform Act of 1873 is a model of modernized courts. It is, therefore, unnecessary for us to attempt to secure reform of our courts by the introduction of legislation of an experimental nature. As Hon. Henry Upson Sims states in his admirable essay on Reforming Judicial Administration, "the new system of courts created by the English Judicature Act of 1873 not only still works satisfactorily in England, but has been accepted as a model by students of reform and critics of common law institutions all over America as well."

The limits of this address will not permit an adequate summary of the English Judicature Act and I will therefore content myself with quoting the conclusions of a modern critic, Prof. Roscoe Pound, of Harvard, applied as his general recommendations for American adoption, as found in

the article mentioned by Mr. Sims. Prof. Pound says:

"The whole judicial power of each state * * * should be vested in one great court, of which all tribunals should be branches, departments or divisions. * * * This court should be constituted in three chief branches: (1) county courts or municipal courts; (2) a superior court of first instance; (3) and a single ultimate court of appeal. The first should have exclusive jurisdiction over all petty causes. There should not be a separate judge for each locality. Instead, all the courts with petty jurisdiction should in the aggregate constitute one court, or a branch of the great court, but this branch of the court should have numerous local offices where papers may be filed and as many places for hearing causes in each county as the exigencies of business may require. * * *

"The second branch would be a superior court of first instance with a general original jurisdiction at law, in equity, in probate and administration, in guardianship and kindred matters and in divorce. It should also have general jurisdiction. It should have numerous local offices where papers may be filed, and at least one regular place of trial in each county. * * * Some high official of the court should be charged with supervision of the judicial business of the whole court, and he should be responsible for failure to utilize the judicial power of the commonwealth effectively. * * * And the third great branch of the court would be a single court of appeal to which causes must go directly for review upon the law from the county courts or from any division of the superior court. All the judges of the commonwealth should be judges of the whole court."

The plan, then, proposed is simple, is neither academic, experimental or revolutionary. It has been in successful operation in England since 1873 and in the unified municipal courts of Chicago, whose business organization secured the utmost economy, efficiency and impartiality in the administration of law in the second largest city in the country. This plan for unification of the judicial system was endorsed by the special committee of the American Bar Association in its report in 1909, the committee being entitled "A special committee

to suggest remedies and formulate proposed laws to prevent delay and unnecessary cost in litigation."

The committee says:

"The first principle which the committee desires to submit is that of unification of the judicial system.

I. The whole judicial power of each state, at least for civil causes, should be vested in one great court, of which all tribunals should be branches, departments or divisions. The business as well as the judicial administration of this court should be thoroughly organized so as to prevent not merely waste of judicial power, but all needless clerical work, duplication of papers and records and the like, thus obviating expense to litigants and cost to the public."

In speaking of this plan, the committee says, that while the whole judicial power should be concentrated in one court, the court should be constructed in three branches. First: county courts, including municipal courts, having exclusive jurisdiction of all petty causes, all of them to constitute one branch with numerous local offices where papers may be filed and as many places for hearing causes in each county as the exigencies of business may require. Second: a superior court (our circuit courts,) having a defined original, exclusive, general jurisdiction at law, in equity, in probate and administration, in guardianship, and kindred matters, and in divorce; this court to have numerous local offices where papers may be filed and at least one regular place of trial in each county and to be divided into at least two, and probably three, divisions— (a) one for disposition of actions at law and other matters requiring a jury or of kindred nature; (b) one for equity causes; and; (c) one for probate administration, guardianship and the like. The first might be called the law division or the common pleas division, the second the equity or chancery division, and the third the probate division. The third branch would be a single ultimate court of appeals."

The principle of all these plans has been adopted by the American Judicature So-

society, a philanthropic association organized a few years ago to promote the efficient administration of justice. As stated by Mr. Sims in his article on "Reforming Judicial Administration," the society has published so far about a dozen bulletins, consisting of discussions and criticisms of the existing systems of judicial administrations in America, together with recommendations for its reform, and for the aid of legislators, the society has issued several complete model bills to be enacted into laws, where complete reform of the courts is contemplated, prefaced by proposed constitutional amendments necessary in most instances, as the model bills generally conflict with details in existing state constitutions."

Unified Courts.—The basic principle of the reforms proposed by the committee of the American Bar Association, and the American Judicature Society, is the unification of the entire judicial system of the state and the power given the chief justice to marshal all the judicial forces of the state to meet the pressure of business in any branch of the court or in any part of the state. They all contemplate complete and thorough supervision of the business of all the courts by some one in high authority, such as the chief justice, with the power to make reassessments or temporary assignments of judges to particular localities as the state of judicial business, vacancies in office, illness of judges or casualties might require, and with power subject to general rules, to transfer causes or proceedings in any court for hearing or disposition according to the condition of the dockets and to see to it that all the judicial power of the state is effectively utilized. The same general supervision which the chief justice gives to the whole court is exercised by each branch and each division, in each locality by some other officer who is especially charged with the duty and is responsible for the efficient and businesslike conduct of the affairs of the courts under his control and the disposition of causes upon the dockets.

The plan of the American Judicature Society contemplates that the states should be divided into say six or seven circuits, with corps of judges, one circuit judge made chairman for the circuit, with complete power to regulate the assignment of causes to the different courts in his circuit and to designate that judge who might be most fitted for the duty in each branch of the court. Such chairman will also have power to transfer causes from one division of the court to the other. All the plans seek to secure a thorough business administration of the courts and to overcome the decentralizing conditions which now exist, by which the clerks and other officials of each court are practically independent functionaries over whom even the judge of their own courts has but little control. It is important that the legislature should not undertake the formulation of detail rules for the business administration of the courts, but only to lay down general principles and leave it to the court to regulate details and to alter and improve the rules as the problems are met and the best solutions for them ascertained.

Economy From Unified Courts.—There is another consideration of controlling importance in favor of a unified and thoroughly organized system of courts with a simplified practice, and that is the decrease in the number of judges and the expenses of the judicial department. The committee of the American Bar Association summed up the advantages of such an organization of the courts, of judicial business and clerical and administrative work of the courts as follows:

"I. That it would make a real judicial department. The several states, they say, have courts but they do not have any true judicial department."

"II. It would do away with the waste of judicial power involved in our present system of separate courts with hard and fast personnel. Where judges are chosen for and their competency is restricted to rigid districts or circuits or courts, it is a familiar consequence that business may be congested

in one court while judges in another are idle. The judicial department should be so organized that its whole force may be applied to the work in hand for the time being, according to the exigencies of that work."

"III. That it would do away with the bad practice of throwing causes out of court to be begun over again in cases where they are brought or begun in the wrong place. They may be transferred simply and summarily to the proper branch or division or rules may provide that the cause be assigned at the outset to the place and division to which it belongs and no question of jurisdiction will stand in the way."

"IV. It would do away with the great and unnecessary expense involved in the transfer of causes, obviating all necessity of transcripts, bills of exceptions, certificates of evidence and the like, and permitting original files, papers and documents to be used, since each tribunal, as a branch or division of the whole court, may take judicial notice of all files, papers and documents belonging to the court."

"V. It would obviate all technicalities, intricacies and pitfalls of appellate procedure. An appeal would be merely a motion for a new trial, or for modification or vacation of the judgment before another branch of the same court. It would require no greater formality of procedure than any other motion."

"VI. It would do away with the unfortunate innovation upon the common law by which venue is a place where an action must be begun, rather than a place where it is to be tried, so that a mistake therein may defeat an action entirely instead of resulting merely in a change of place of hearing. This innovation is especially unfortunate when it is applied to equity cases where originally there was no venue. If all tribunals are parts of one court, there need be nothing beyond a transfer of the cause. All proceedings up to the date thereof may be saved."

"VII. It would obviate conflicts between judges of co-ordinate jurisdiction, such as unhappily obtain too often in many localities under a completely decentralized system, which depends wholly on the good taste and sense of propriety of individual judges or on the slow process of appeals to prevent such occurrences. * * * As most of our courts are organized at present, there is nothing to prevent any judge from trying any cause pending in the court he pleases,

regardless of how foreign it is to the work he and his colleagues have agreed he shall attend to."

"VIII. It would allow judges to become specialists in the disposition of particular classes of litigation. The prevailing system of rotation is unfortunate. Usually where there are a number of judges, they take up in rotation civil trials with juries, equity causes and criminal cases. By keeping a judge continuously occupied in one class of cases, he becomes thoroughly familiar therewith and this specialization was the real advantage of the separate courts of law and equity. INSTEAD OF SEPARATION BETWEEN LAW AND EQUITY IN PROCEDURE, THE DESIRABLE THING IS SEPARATION IN ADMINISTRATION. The way to obtain this is to organize the court in such a way that the judges may be assigned permanently to the work in which they prove most fit."

"IX. It would bring about better supervision and control of the administrative offices connected with judicial administration and make it possible to introduce improved and more businesslike methods of the making of judicial records and clerical work of the courts."

All these plans for the unification and simplification of the organization of our courts could only be put in operation by amendments to the present constitution.

Judicial Council.—Another novel feature of the plan is the creation of what is termed the judicial council. This council is to be composed of the chief justice, the presiding justices of each of the several divisions of the superior or circuit courts and the presiding justices of the county courts, if he be other than the chief justice, but if not, then a county judge to be appointed by the chief justice in writing, one justice of the court of appeals and one judge of the general court of judicature, to be appointed by the chief justice. This judicial council is entrusted with very large and important powers. They can reduce or add to the number of judges of any division of the superior or circuit court, provided they do not exceed the number of judges provided by law, and provided that the reduction of

the number of judges can only be effected when a vacancy occurs.

This council is intrusted with the power to make, alter and amend all the rules of pleading, practice and procedure in all the courts of the state, including district magistrates. They have power to regulate the duties of the officers of every court and the cost of proceedings therein. They are vested with the power to make rules and regulations respecting the conduct of the business of the clerk for the general court of judicature and the jury commissioners and prescribe the duties of the clerk and jury commissioners and their subordinates and to regulate the sittings of the court of appeals and all other courts of the state. The act provides that all the pleading, practice and procedure in every court shall be repealed as statutes, but declared to be operative as rules of court for the general court of judicature, but subject to the power of the court and the judicial council thereof, to make, alter and amend the rules regulating practice, pleading and procedure in said court. Under this plan, there would be one chief clerk of all the courts in the state, located at the capital, to be appointed by a majority of the judicial council, and to hold office at their pleasure.

The office of register and master in chancery would be abolished upon the expiration of terms of those holding office. Masters would be eligible to sit in any court or to discharge any judicial function which the judicial council might authorize, and until such action, the duties of the master would be those now required by law. Another novel provision is that the masters would be subject to assignment to any other division of the circuit or superior courts by the chief justice, in his discretion.

As stated by the American Judicature Society, the purposes of their plan is to secure administrative authority, co-operation and coherence of effort. They state "that the spirit of co-operation, and the esprit de corps, of the entire judiciary is

fostered by an annual convention of judges, at which the judges meet as a whole to receive the report of the chief justice and at which meeting they can sit and recommend all such rules and regulations for the proper administration of justice in their courts as may seem expedient and to consider all complaints with reference to their courts and the officers thereof or consider such other matters in reference to the administration of justice as the chief justice may bring before them." In view of his large duties, powers and responsibilities, the chief justice is given a salary of fifteen thousand dollars per year. The fee system, wherever it exists, is abolished and all the fees now paid to registers in chancery, clerks and probate judges are collected and turned into the state or county treasury. It has been estimated that the adoption of this plan in Alabama would reduce the expenses of the judiciary more than one-half and would moreover prevent any waste of judicial power and secure more speedy, vigorous, inexpensive, and efficient enforcement of the law.

Simplification of Procedure.—One of the most important reforms which all these plans contemplate is the simplification of pleading, practice and procedure. The ability of our courts to dispense justice speedily, and economically, has been largely lessened by legislative action. Questions of procedure, involving no substantial rights, are peculiarly within the expert knowledge of the judges and belong to judicial, rather than to the legislative branch of the government. There are many eminent authorities that contend that the regulation of practice and procedure in the courts by legislative enactments is an invasion by the legislature of the inherent rights of the court and violates the constitutional doctrine of the separation of powers.

Rules of procedure exist only to save time, to advance the business of the court, to secure to each party a fair opportunity to meet the case against him and to present

his own case, and should not be allowed to be used as a method to obstruct business, waste time or defeat the ends of justice. In matters of practice, pleading and procedure, therefore, it is evident that the rule-making power of the courts should not be hampered or fettered by legislative restrictions or inhibitions. They should be settled by rules of court, which might be changed as actual experience of their operation and application might dictate. Questions of practice and procedure consume a large amount of the time of our nisi prius courts, delay the administration of the law, and the decision of the many perplexing questions they create entails unnecessary labor upon our appellate courts. The delay and expense which now attends the trial of important cases will continue as long as the present, clumsy, inefficient and antiquated methods of practice, pleading and procedure remain.

It has been estimated that at least one-third of the work of our appellate courts consists in passing on the pleadings in personal injury cases. Vested with proper power, the supreme courts could easily prepare simple and short forms of pleadings in personal injury and other cases, forms of complaint for every kind of action, and thus lighten the labors of the bar, of our nisi prius and appellate courts. During the last session of the legislature, I prepared and submitted for their consideration a simple practice act similar to the one endorsed by the American Bar Association, being the type of practice act adopted by the state of New Jersey, by which the supreme court was given the power to adopt rules of practice, procedure and pleading, and providing that such rules should supersede any statutory or common law regulation theretofore existing.

Common Law Power of Judges.—The common law power of judges should be restored. The reason why trials consume so much more time in this country than in England is largely due to the fact that we have withdrawn from the courts their com-

mon law powers to exercise control over the trial of the cause. Clothed with the power vested in judges by the common law, a judge upon our bench could restrict counsel to the argument of relevant and material questions, could promptly overrule and discourage technical objections, could prevent useless and unnecessary consumption of time by the introduction of immaterial and irrelevant evidence or by the argument of questions as to which the court has a clear and decided opinion, and could without fear of reversal, exercise the necessary authority so essential to the prompt and efficient administration of justice. With the present legislative restrictions, our judges are denied their common law power of summing up the evidence, and thereby presenting the issue clearly and intelligently to the jury, but are converted into mere presiding officers whose principal duty is to confuse the jury by submitting exhausting presentations of legal questions. It has been claimed that the restoration to our state judges of their common law powers, would result in abuse or judicial tyranny but the prompt and impartial administration of the law which has characterized our federal courts as well as the courts in England, conclusively show that these fears are groundless. Increasing the power of our judges by restoring to them rights which have been exercised for centuries by the nisi prius courts of England would tend to elevate the standard of our courts and largely increase their efficiency and result in promoting a more speedy and impartial administration of the law.

Hon. Elihu Root, president of the American Bar Association, speaking of the statutes found in many states and quite recently urged upon congress prohibiting judges from expressing any opinion to the jury upon question of fact, makes the following convincing reply:

"From time immemorial, it has been the duty of the court to instruct juries as to the law and advise them as to the facts. Why is it that by express statutory provision the only advice, the only clarifying opinion and

explanation regarding the facts, which stand any possible chance to be unprejudiced and fair in the trial of a cause, is excluded from the hearing of the jury? It is to make certain that the individual advantages gained by having the best lawyer shall not be taken away. It presents the individual's right to win, if he can, and negatives the public right to have justice done. It is to make litigation a mere sporting contest between lawyers and to prevent the referee from interfering in the game. The fact that such provisions can be established and maintained, exhibits democracy's tendency to yield support to the human interest of the individual as against the exercise of even its own power by its own representatives and for its own highest purpose."

Justice of the Peace and Inferior Courts.—Both should be abolished. District magistrates, under the new plan, take the place of the justice of the peace and inferior courts. They are attached to the county court and their number is determined by the population and the discretion of the judicial council. All the justices of the peace, police magistrates and inferior courts are made by the act first district magistrates. Until otherwise directed by the council, the district magistrates exercise the judicial power of the county court in all matters within the jurisdiction of the justices of the peace, or any cause or matter within the jurisdiction of the county court, assigned especially by the county judge to the district magistrate, or any cause within the jurisdiction of the county court which the parties agree may be heard by the district magistrate. The county judge can transfer any cause from any district magistrate to the county judge or any associate judge of the county court for hearing and determination. The judicial council is authorized to transfer to the district magistrates all or such part of the judicial power of the county courts as they may see proper and can require such district magistrate to perform such duties with respect to the business of the county court or any branch thereof or of any branch office of the clerk of the general court of judicature in the county as the judicial council may

determine. The immediate supervision of the work of the district magistrates is in the hands of the county judge; justices of the peace are now practically independent of all supervision and this power of supervision on the part of the county judge eliminates one of the principal defects of the present justice of the peace system.

Selection and Retirement of Judges.—Three plans have generally prevailed in this country for the selection of judges, appointment by the governor, appointment by the chief justice, and election by the people. Since the introduction of the primary system of nominations, this latter method has not proven very satisfactory and there has been a steady decline in the standard of the courts. Under the convention system, which had its origin in our representative theory of government, the lawyers constituted a very considerable proportion of the delegates and on account of their peculiar knowledge of the fitness of the applicant, a higher class of judges were selected. One advantage of the convention system was that there was a sense of responsibility on the part of the delegates, which unfortunately is too often lacking with the voter under the primary nomination plan. The necessary result is that in casting his ballot under the latter system, friendship, locality, personal obligations or prejudice, solicitation or activity of the candidate generally exercise a controlling influence. Under the convention system, the office frequently sought the man, whereas under the primary plan no man can be nominated who does not actively seek the nomination.

The consequence is that under the primary plan we are confined in our choice to those active politicians, who seek the nomination, and the candidate who is the best mixer, who conducts the expensive press bureau, who employs the largest number of workers and agents and who is most industrious in seeking votes or who can appeal to local prejudice or passion, has the best chance of winning, regardless

of qualifications. The test of fitness is no longer knowledge of the law, but the possession of those qualifications which enables one to become a successful ward politician. Knowledge of human nature, influences that control human action is more important than profound learning of the law. The tricks of the politician count for more than the learning of a Story or a Marshall.

What then is the purpose of an appointment or election but to put into office that man who by reason of his legal knowledge, his impartiality and judicial temperament, independence and high character guarantees a firm, vigorous and impartial administration of the law? Whatever system, whether by appointment or election, that will accomplish these results, is the system we should adopt.

The primary system and the popular election of judges does not tend to create an independent judiciary. On the contrary, its tendency is to incline the judge to yield to popular passion and prejudice, to be swayed by every passing breeze of popular sentiment and to allow his own re-election to exercise a controlling influence in his official conduct. Fortunately, there are many judges who rise above such grovelling influences and who do their duty, even though the thunder of popular disapproval light on their unterrified brows.

The latest conclusions of the American Society of Judicature suggests some very wise solutions of the evils of the present system and are worthy of serious consideration. Under their plan, the chief justice of the highest court in the state and of the unified courts of the state should be chosen by the entire electorate of the state, for a term "neither too long to make him unmindful of public approval, nor too short to make the office worth the strain of repeated campaigns," and should be given the absolute power of selection and appointment of all the other judges of his court, whose positions become vacant during his term of office. It is further suggested by their plan that at stated periods,

say at the expiration of three years, at the expiration of nine years and at the expiration of eighteen years from the date of their appointment of each of these judges, the question should be submitted to the entire electorate with reference to the judges who have been sitting for those periods respectively, "shall the judge be retained? Yes or No?" If a majority of the voters vote in the negative the judge is rejected and the chief justice appoints someone else to fill the vacancy.

This plan overcomes one of the chief evils of the present system. No reason can be shown why a judge who is satisfactory should be compelled to submit to a competitive race to retain his position. Whether appointed or elected, the sole question to be submitted to the electorate at the expiration of his term is "Shall John Doe, who has served continuously as judge _____ years be retained; answer yes or no." Then after being retained for two or three terms by the express consent of the voters, the judge is to be continued in office till the age of retirement, without further elections. This plan gives the people the right to recall a judge who is unsatisfactory, but until he is recalled there is no vacancy in his office, and even if the present system is continued, candidates seeking judicial positions must wait until the people have declared that the sitting judge is unsatisfactory and shall not be retained, before they can seek the office.

The campaign rivalry and unseemly contests between judges on the bench and candidates for their position, which under our system has done so much to impair the integrity and independence of the judiciary and to lower the standard of the judicial office, would be ended. A lawyer's reputation is largely local. The qualities which make a successful advocate and attract public attention are not necessarily those qualities which equip a lawyer for a judicial office. If it is difficult for the bar, then how much more difficult is it for the public at large to make a wise and discriminating

choice between candidates for judicial positions. The judge on the bench should not be retired unless his services are unsatisfactory and until the people determine by an election that sole question, he should not be forced to enter into a competitive contest to retain his seat. The mass of the people, by whom the judges are elected in these competitive contests, are confessedly ignorant of the fitness or unfitness of the candidates, but they can readily decide whether the sitting judge has been satisfactory and should be retained.

In Conclusion.—The adoption then of the plan for one great court of which all courts of the state are branches or divisions, according to the model law drafted by the American Society of Judicature, and the recommendations of the English Judicature Commission, would unquestionably give Alabama the best judicial structure of any State in the Union. It would not only save the state many hundreds of thousands of dollars by reducing the expenses of the judiciary one-half at least, but would moreover remove the embarrassing, costly and inexcusable defects of our appellate procedure. It would prevent any waste of judicial power, the delays and costs of appeals, of dismissals on account of mistake in venue, the duplication of clerical work, but would thoroughly organize the work of every court, place the power to make rules in the courts where they belong, and enormously increase the vigor, efficiency and economy of the administration of the law. In this great movement for judicial reform, the bar should become the leaders and not allow any ultra spirit of conservatism to check their zeal in a cause so vital to the future welfare and progress of the commonwealth. When these reforms are accomplished, then and not until then will the promises of the Great Charter be realized—"We will sell to no man; We will delay to no man; We will deny to no man, either right of justice."

EMMET O'NEAL.

Florence, Ala.

BILL OF LADING—NEGOTIABILITY.

95 S. E. 777.

COMMERCIAL NAT. BANK v. SEABOARD AIR LINE RY.

Supreme Court of North Carolina.
April 24, 1918.

A common carrier is not bound by a bill of lading issued by its agent, unless the goods were actually received for shipment, and is not estopped by the bill of lading from showing by parol that no goods were in fact received, although the bill has been transferred to a bona fide holder for value.

Appeal from Superior Court, Wake County; Stacy, Judge.

Action by the Commercial National Bank against the Seaboard Air Line Railway. Judgment sustaining demurrer to complaint, and plaintiff appeals. *Affirmed.*

The complaint alleged, in effect:

"That it purchased for value and is the owner of certain bills of lading issued by the defendant company through its local freight office in the city of Raleigh which were made to the Raleigh Grain & Milling Company and indorsed to the order of plaintiff, on which bills of lading drafts were attached, drawn by said Raleigh Grain & Milling Company on the consignees, payable to plaintiff, which drafts plaintiffs discounted at their face value."

Then follows itemized statement of drafts and bills, giving names of consignees, etc., and aggregating \$5,091.80; that said drafts were returned "not paid," with the information that no goods had been received by the consignees, and that plaintiff is informed and believes that the defendant, the Railroad Company, did not receive the goods as represented by the bills of lading and no shipments were made on account thereof, and that the Raleigh Grain & Milling Company was totally insolvent.

Defendants demur because it appears from the complaint that the goods, as represented by the bills of lading attached to the complaint, were not actually received by defendant and defendant is not bound thereby, although they have been transferred to a bona fide holder for value, and that the copy of the form of bill annexed to complaint contains the notation, shipper's load, and count, etc. There was judgment sustaining the demurrer, and plaintiff excepted and appealed.

HOKER, J. In Williams, Black & Co. v. Railroad, 93 N. C. 42, 53 Am. Rep. 410, it was held that:

"A common carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment; and the principal is not estopped thereby from showing by parol that no goods were in fact received although the bill has been transferred to a bona fide holder for value."

This decision, fully approved in the more recent case of *Peale v. Railroad*, 149 N. C. 390, 63 S. E. 66, has since been the accepted and unquestioned law of the state, and, to our minds, the ruling is in accord with right reason and sustained by the decided weight of authority in other jurisdictions. *Mo. Ry. v. McMadden*, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998; *Ray & Roy v. Northern Pacific R. R.*, 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, 7 Ann. Cas. 728; *Baltimore, etc., R. R. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *National Bank of Commerce v. Railroad Co.*, 44 Minn. 224, 46 N. W. 342, 560, 9 L. R. A. 263, 20 Am. St. Rep. 566. The position and the principles upon which it may be properly made to rest are very impressively stated by Mitchell, Judge, in the Minnesota case, *supra*, as follows:

"The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority, i. e., the power with which his principal has clothed him in the character in which he is held out to the world, is the same, viz. to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority, to issue the bill, the rule being that, if the authority of an agent is known to be open for exercise only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was

issued fraudulently and collusively, or merely by mistake."

And further in the opinion, while recognizing the force of the opposing position, going so far as to say that if the question was *res integra*, it might be allowed to prevail, the learned judge gives the practical suggestions in support of the court's decision as follows:

"But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property; and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading."

Suggestions that, to our minds, embody the weightier reason.

It is argued for the plaintiff that as a recent federal statute (chapter 415, Act Aug. 28, 1916, 39 U. S. Stat. at Large, pt. 1, p. 538 [Comp. St. 1916, §§ 8604aaa-8604w]) makes these bills of lading negotiable, the question of public policy involved in these cases and, so far as the federal decisions are concerned, is no longer of weight. On a cursory examination of the statute in question, there is doubt if the law does or was intended to make bills of lading negotiable in the full sense of the term, that is, to the extent that ordinary commercial paper is so. *Nat. Bank v. Railroad*, *supra*, and see an interesting article on this subject in Michigan Law Review for April, 1918, p. 402. But, if this be conceded, the fact that such a law was deemed necessary to bring about a change, and that Congress considered the subject with its attendant results of such perplexity and importance as to require a statute of 45 sections to deal with it adequately and safely, makes rather against the plaintiff's position as to what the law now is, for ours is only the *jus dicere*, and leads to the conclusion also that, if any change is found desirable, it should be by the lawmaking body, where all the practical suggestions that are presented in such a problem may be fully discussed and determined.

As now advised, we must adhere to our former decision and the judgment for defendant is affirmed.

Affirmed.

BROWN, J., did not sit, and took no part in the decision of the case.

NOTE.—Liability of Carrier to Bona Fide Holder of Bill of Lading Negligently or Fraudulently Issued.—There is considerable diversity of view as to the holding made by the instant case, and in some of the States a provision has been made by statute, as article in Michigan Law Review (April, 1918) shows is the case as to interstate commerce. It is to be inferred that the instant case regards the act of Congress as confirmatory of the view it takes of the matter. But it may be thought that Congress merely recognized the ruling made in Pollard v. Vinton, 105 U. S. 7, 26 L. ed. 998 and Mo. Ry. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. ed. 944.

In Sealy v. M. K. & T. R. Co., 84 Kan. 479, 114 Pac. 1077, 41 L. R. A. (N. S.) 500, the ruling turned upon the meaning of a Missouri statute, which in terms made bills of lading negotiable "in the same manner as bills of exchange and promissory notes," after proper indorsement. Independently of that statute Missouri courts had expressed the view held by the instant case, but the Kansas court held that the Missouri statute changed that rule. And the Kansas court declared its own view in a later case differently from that held in the instant case, citing several antecedent Kansas cases. Harved v. Ry. Co., 93 Kan. 456, 144 Pac. 823, citing Savings Bank v. A. T. & S. F. R. Co., 20 Kan. 519. Ry. Co. v. Hutchings, 78 Kan. 758, 99 Pac. 230; Hutchings v. Ry. Co., 84 Kan. 479, 114 Pac. 1079.

It was argued by the court that: "There is no difference in the legal consequences flowing from a bill issued without receipt of the goods at any time, and one issued before the goods are received, provided a loss falls upon the transferee in the usual course of business as a direct consequence of the misstatement." It is said the rule in Kansas "invests the innocent holder of a bill of lading with rights not available to the original holder."

In Dulaney v. Phila. & R. R. Co., 228 Pa. 180, 77 Art. 507, it was held that where a number of connecting railroads enter into arrangements by which they employ agents at different points to solicit freight and one of them issues a bill of lading without the initial carrier ever having received the goods and knowing that it is to be attached to a draft on consignees the latter paying the draft but never receiving the goods, may recover the amount from the terminal carrier, as there was a joint liability on the part of all of the companies, whether the bill of lading be in fact negotiable or not.

It was said: "The negotiability or non-negotiability of the bill is not in question. Even though one would have been protected by the delivery of the goods without getting possession of the bill, the carrier had the right to demand it before making the delivery, and the plaintiffs were justified in presuming that such a demand would be made; they only did the

natural and proper thing in accordance with the usual course when they paid the draft and took up the bill."

This case distinguishes a case where consignee knew as matter of fact before he paid the draft that the railroad had not received the articles stated in the bill of lading. L. S. & M. S. R. Co. v. Natl. Live Stock Bank, 178 Ill. 506.

In Roy & Roy v. N. P. Ry. Co., 42 Wash. 572, 85 Pac. 53, 6 L. R. A. (N. S.) 302, the same ruling is made as in the instant case, the court, however, predicating its conclusion upon federal ruling, as then existing, on the ground, that this being a question of general commercial law this ruling ought to be followed, which also was the view in National Bank v. R. Co., 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566.

In Bk. of Batavia v. New York &c. R. Co., 106 N. Y. 195, 12 N. E. 433, 60 Am. Rep. 440, it was said that: "If he (the carrier) desires to limit his responsibility * * to the named consignee alone, he must stamp his bill as 'non-negotiable,' and where he does not do that, he must be understood to intend a possible transfer of the bills and to affect the action of such transferees."

It would seem that this question is regulated in quite a number of states and there are cases on the validity and construction of such statutes. Thus Yazoo & M. V. R. Co. v. G. W. Bent & Co., Miss., 47 So. 805, 22 L. R. A. (N. S.) 821, held that statute making a bill of lading conclusive evidence of the receipt of the statement made in a bill of lading is valid.

So greatly has this subject been regulated by statute that the question is academic in only a few states. It would seem there is not necessarily a question of negotiability involved in holding it negotiable nor the carrier liable on a bill though no goods have been received by it for transportation.

C.

HUMOR OF THE LAW.

Schuyler Merritt, congressman from Stamford, Conn., said at a dinner:

"As one of the heads of a large manufacturing concern, I am much interested in the Bolshevik propaganda among the Russian factories.

"I am afraid the Bolshevik ideas won't go. I heard the other day of a Russian employer who said mildly to a delegation of striking Bolshevik hands:

"I can understand your demands for an increase of 900 per cent in wages, but why do you insist on my reducing your hours of work from ten a day to two?"

"A young Bolshevik struck his employer jovially on the back.

"'We've got to have time,' he laughed, 'to spend our increased wages, haven't we?'"

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1. Attorney and Client—Imputability.—Attorney's knowledge obtained from abstract as to claims of third persons and doubtful validity of vendor's title held imputable to his client, the purchaser.—*Allen v. Frank Janes Co.*, La., 78 So. 115.

2. Bankruptcy—Chattel Mortgage.—Under Rev. St. 1909, §§ 2861, 2887, and 2889, seller of motor car, who received as payment notes reserving title and giving him chattel mortgage, is not, having withheld same from record, entitled to record same and take possession of car as against creditors whose claims had meantime arisen, so where debtor became a bankrupt few days after seller took possession, his lien is subject to attack by trustee in bankruptcy.—*Stewart v. Asbury*, Mo., 201 S. W. 949.

3.—Court Rules.—Where an extension of time for filing a petition to revise was obtained, such petition may be considered, though not filed within the 10-day period prescribed by court rule 38 (235 Fed. xi, 148 C. C. A. xi).—*In re Armann*, U. S. C. C. A., 247 Fed. 954.

4.—Inchoate Interest.—Under Burns' Ann. St. 1914, § 3052, a wife's inchoate interest in her husband's land, given her by sections 3014 and 3029, becomes absolute when his title is transferred by adjudication to the trustee in bankruptcy, and before trustee's sale thereof.—*Harrlin v. American Trust Co.*, Ind., 119 N. E. 20.

5.—Insurance.—An industrial policy, not payable with certainty to any beneficiary, and which it did not appear the insurer would certainly buy, held to have no cash surrender value,

and so not to pass to the trustee in bankruptcy, under section 70a, subds. 3, 5.—*In re Gannon*, U. S. C. C. A., 247 Fed. 932.

6.—Liens.—Under Bankruptcy Act July 1, 1898, § 47a, as amended Act June 25, 1910, § 8, trustee in bankruptcy must be deemed vested with status of lien creditor, though there were no such creditors at time petition in bankruptcy was filed, and hence is entitled to attack chattel mortgages not recorded by mortgagee until discovery that debtor was in failing circumstances.—*National Bank of Bakersfield v. Moore*, U. S. C. C. A., 247 Fed. 913.

7.—Preference.—Where parties plaintiff and defendant in suit by trustee of bankrupt to set aside alleged fraudulent transfer were residents of same state, and transfer was made more than year before filing of petition, federal court had no jurisdiction, either by reason of diversity of citizenship or under Bankruptcy Act, §§ 60b, 67, providing for the setting aside of preferential transfers made within four months of filing of petition.—*Hall v. Glenn*, U. S. D. C., 247 Fed. 997.

8.—Void Transfer.—In suit by trustee of bankrupt to set aside bankrupt's transfer of real property under Bankruptcy Act, § 70e, law of state in which property was located governs, and transfer cannot be set aside, unless subject to attack under such laws.—*Hall v. Glenn*, U. S. D. C., 247 Fed. 997.

9. Banks and Banking—Notice of Invalidity.—While transfer of notes by cashier is presumed *prima facie* to be in due course of business and binding upon bank, if it shows on its face that transferee must have known cashier was assuming a power outside of his duties, not for purposes of the bank, the transfer will be regarded as unauthorized and not binding on the bank, even though the transferee paid value therefor.—*Choctaw Bank v. Gewin*, Ala., 78 So. 96.

10. Brokers—Negligence.—Agents undertaking to procure title to realty for illiterate purchaser, but negligently procuring title to other realty, without purchaser's knowledge, are liable to purchaser for their negligence.—*Towski v. Griffiths*, N. J., 103 Atl. 192.

11. Carriers of Goods—Baggage.—Jewelry is "baggage," and an interstate carrier cannot make it otherwise by rules and regulations filed with the Commerce Commission, although it can properly limit the amount of its liability, under Kirby's Dig. § 6615.—*Bush v. Beauchamp*, Ark., 201 S. W. 828.

12.—Delivery.—Placing car upon public team track, for plaintiff to unload, concurred in and acted upon by plaintiff, was complete delivery, and terminated obligation of defendant as common carrier.—*Anthony & Jones Co. v. New York Cent. & H. R. R. Co.*, N. Y., 119 N. E. 90, 223 N. Y. 21.

13.—Notice of Special Damage.—Notification of express company by shipper of moving picture films that films were to be "rushed" because they were to be exhibited, held insufficient to render express company, delaying shipment, liable for special damages or loss of profits in operation of consignee's theater.—*Chapman v. Fargo*, N. Y., 119 N. E. 76, 223 N. Y. 32.

14. Carriers of Passengers—Assault and Insult.—A carrier must guard its passengers from assaults and insults from their fellow passengers and strangers, if by high degree of care an assault or injury might have been prevented.—*Hoff v. Public Service Ry. Co., N. J.*, 103 Atl. 209.

15.—Relation of Passenger.—When a person presents himself at the entrance of a street car for boarding it, and is so recognized by the conductor, the relation of passenger exists, although the passenger has not actually boarded the car.—*Garricott v. New York State Rys., N. Y.*, 119 N. E. 94, 223 N. Y. 9.

16. Charities—Monument.—“Monument” held used by testator, in creating trust fund, in sense broader and more comprehensive than of conventional commemorative monument to persons dead.—*Rhode Island Hospital Trust Co. v. Benedict, R. I.*, 103 Atl. 146.

17. Chattel Mortgages—Constructive Notice.—Under Civ. Code Cal. § 2955, chattel mortgage on merchant's stock in trade, though recorded, imports no constructive notice to the world, and, though valid between parties, is invalid as to creditors of mortgagor and subsequent purchasers for value in good faith.—*National Bank of Bakerfield v. Moore, U. S. C. C. A.*, 247 Fed. 918.

18.—Replevin.—In replevin by the assignee of notes and a chattel mortgage given to secure the price of goods sold, defendant may set up any matter of defense or relief she may have, including one of partial failure of consideration in that she has paid more than the worth of the property.—*Schedel Western X-Ray Co. v. Bacon, Mo.*, 201 S. W. 916.

19. Commerce—Employee.—Railroad yardmaster employed by terminal railway company, injured while engaged in attempting to replace derailed engine on track so as to remove it and clear tracks for transportation of interstate commerce, was engaged in interstate commerce at time of his injury.—*Spaw v. Kansas City Terminal Ry. Co., Mo.*, 201 S. W. 927.

20.—Franchise Tax.—Acts 1915, p. 397, § 16, imposing franchise tax on foreign corporations, based on capital actually employed within state, is not unconstitutional as unwarranted burden on interstate commerce.—*Louisville & N. R. Co. v. State, Ala.*, 78 So. 93.

21. Constitutional Law—Obligation of Contract.—If the state could deprive an officer of the salary of his office by refusing to make appropriation therefor, it would impair its direct obligation.—*O'Neil v. State, N. Y.*, 119 N. E. 95, 223 N. Y. 40.

22.—Statutory Law.—As a state cannot, under Const. U. S. Amend. 14, forbid a citizen from entering into contract without its limits while remaining within, Rev. St. Mo. 1899, § 7897, which is a nonforfeiture statute, held not to apply to loan agreement between a Missouri policyholder and a New York company licensed to do business in the state, where it was expressly stipulated that the New York law should govern.—*New York Life Ins. Co. v. Dodge, U. S. S. C.*, 38 S. Ct. 337.

23.—Written Constitution.—Canadian Dominion Parliament not being bound by written constitution, and power to repeal or amend every act

being reserved by Rev. St. Canada, c. 1, § 47, rate of assessment of beneficiary society chartered by Dominion may be changed by amendment of charter by Dominion Parliament, irrespective of whether power was expressly reserved by the beneficiary society, in contract with certificate holders, to change assessment rates.—*McClement v. Supreme Court, I. O. F. N. Y.*, 119 N. E. 99, 222 N. Y. 470.

24. Contracts—Illegality.—Where plaintiff's son seduced defendant, who, with her family, agreed to forego prosecution if plaintiff would indorse notes to defendant, and the indorsement was executed so far as transfer of title was concerned, the contract being illegal, plaintiff could not have cancellation of the indorsement and retransfer of title, especially as her further and executory liability as indorser was subject to the complete defense of illegality.—*Berry v. Dunn, Ala.*, 78 So. 51.

25. Covenants—Void Deed.—That deed from defendant's grantee to unincorporated company and from it to plaintiff's grantor were void, held not to deprive plaintiff of right to sue on defendant's covenant of seisin, where in a suit by heirs of defendant's grantee against the company and plaintiff's grantor a final decree was rendered that the land was owned by plaintiff's grantor, in view of Rev. St. 1909, § 2793.—*Talbert v. Grist, Mo.*, 201 S. W. 906.

26. Damages—Breach of Contract.—For breach of building contract partially performed, rule as to damages is profits contractor would have realized after deducting from contract price cost of materials and labor.—*Warner v. McLay, Conn.*, 103 Atl. 113.

27. Dedication—Injunction.—Owner abutting on street, whose property was bounded on other sides by other streets, could maintain bill to enjoin city from converting street or part thereof into public cemetery.—*City of Troy v. Watkins, Ala.*, 78 So. 50.

28. Depositions—Objections.—In action for loss of freight in shipment a card containing sealed record taken when car was delivered to consignee, although not attached to deposition of witness who identified it and stated its contents, should have been admitted, where there was no objection made at time deposition was taken.—*Oceana Canning Co. v. King, Mich.*, 166 N. W. 847.

29. Divorce—Collateral Attack.—Although where plaintiff went to a foreign jurisdiction, solely for the purpose of instituting divorce proceedings, on service by publication the decree may be attacked for fraud by action in a foreign state, yet such attack cannot be sustained where the plaintiff removed with the bona fide purpose of making a home in such state.—*Kenner v. Kenner, Tenn.*, 201 S. W. 779.

30. Domicile—Residence.—Though actual residence is circumstance tending to establish place of domicile at place of residence, it is not conclusive, and personal presence in place, even for protracted period, does not of necessity fix domicile in that place.—*White v. Stowell, Mass.*, 119 N. E. 121.

31. Easements—Footpath.—A deed of a right “to pass to the highway by the shore of the flowage, such as will convene his purpose,” to an Indian without horses, held not to grant a cartway or a way to be used by automobiles, but simply a footpath.—*Dana v. Smith, Me.*, 103 Atl. 157.

32. Eminent Domain—Benefits and Damages.—That plaintiff, owner of realty, appeared before board of benefits and damages without making any claim that prior proceedings for widening street was invalid, held not to estop him from asserting invalidity of proceedings where he had no knowledge of irregularities when he appeared before board.—*Crawford v. City of Bridgeport, Conn.*, 103 Atl. 125.

33. Equity—Mistake of Law.—While equity will not relieve from a mistake of law, a bank

which loaned money to pay a first trust deed and taxes under false representations that a third trust deed was satisfied, accompanied by a showing of a note which was in fact forged, and the satisfaction of which was forged, was entitled to relief on the ground of mistake of fact.—*State Sav. Trust Co. v. Spencer*, Mo., 201 S. W. 967.

34. **Esteppe**.—Evidence.—Where plaintiff to support his case offers his written release of all claims against defendant for damages, and testifies, without contradiction, that he never executed the release, and that his signature was obtained by fraud, he destroys evidential value of the release, and cannot use it to support consideration for different oral promise.—*McDonald v. Central R. Co. of New Jersey*, N. J., 103 Atl. 198.

35.—**Privity**.—Where neither complainant nor his predecessors in title were connected with a litigation against defendant's predecessors or had any knowledge of allegations in pleadings therein, there could be no estoppel in favor of complainant by reason of allegations against defendant or its predecessor, there being no mutuality or privity.—*Kobbe v. Harriman Land Co.*, Tenn., 201 S. W. 762.

36. **Explosives**.—**Wanton Injury**.—Evidence that six-year-old boy secured nitroglycerin caps under or near portable shed which defendant used as office in selling lots and was injured by throwing them in fire several days later does not establish that defendant wantonly injured or exposed him to danger, even though boy be considered licensee.—*Kidder v. Sadler*, Me., 103 Atl. 159.

37. **Fixtures**.—**Mortgage**.—Letters from mortgagor to second mortgagee redeeming from first mortgage, referring to fact that second mortgagee had become the "owner of the property," did not amount to surrender by mortgagor either of title or right to possession of machinery on mortgaged premises.—*O'Dell v. Day*, Mich., 166 N. W. 872.

38. **Food**.—**Action**.—A domestic employed in a family of one who purchased pork product prepared by defendant from diseased pork and sold by it to a retailer who sold it to her employer in case of defendant's negligence could recover for sickness resulting from eating the food, though there was no contractual relation between her and defendant.—*Cox v. New England Equitable Ins. Co.*, U. S. C. C. A., 247 Fed. 955.

39. **Fraud**.—**Deceit**.—Neither new nor second-hand X-ray machines are commonly used, and where plaintiff's agent, who was selling these machines, helped plaintiff's assignor in selling to defendant, who knew nothing about their value, seller's statement of value was more than mere opinion, amounting to deceit.—*Scheidel Western X-ray Co. v. Bacon*, Mo., 201 S. W. 916.

40.—**Variance**.—Where the declaration alleged that the vendor took the purchaser to the lots and pointed out the fact that the sidewalks were laid and stated that they were paid for, and the proof showed that the statement was made in the office, and not on the ground, the variance was not fatal.—*State Security & Realty Co. v. Badger*, Mich., 166 N. W. 950.

41. **Fraudulent Conveyances**.—**Entireties**.—Where property, held by husband and wife in entirety, was by them conveyed to a third party with agreement to reconvey to the wife alone, she having paid the consideration therefor out of her separate estate, and the husband being in financial difficulties, such transaction was not one in fraud of creditors, precluding equitable aid, where third party violated his agreement.—*Butte Inv. Co. v. Bell*, Mo., 201 S. W. 880.

42. **Gas**.—**Negligence**.—Where escape of natural gas from pipe lines could be heard and, when lighted, seen, owner, not learning of leak until injury to child, and whose perfunctory inspection was not likely to have informed it of leak, was negligent in not discovering leak, and liable for injury.—*Jackson v. Texas Co.*, La., 78 So. 137.

43.—**Penalties**.—If the penalty provided for violation of ordinance limiting the price of gas is not excessive in each particular case, it is not

excessive as matter of law; nor is it made excessive by the fact that its violations would be many and its aggregate penalties large.—*City of Kalamazoo v. Kalamazoo Circuit Judge*, Mich., 166 N. W. 998.

44. **Husband and Wife**.—**Indemnity**.—Where officers and stockholders of bank entered into agreement to save surety harmless, on account of bond given to secure deposit of county funds, such indemnity agreement being one of the community under the laws of Washington, the wives of the indemnitors were proper parties in an action thereon.—*National Surety Co. v. Blumauer*, U. S. C. C. A., 247 Fed. 937.

45. **Indictment and Information**.—**Intoxicating Liquor**.—Indictments and affidavits following statute in charging that defendant in county of state on particular date named kept, ran, and operated place where intoxicating liquors were unlawfully sold, in violation of laws of state, are sufficient under Burns' Ann. St. 1914, § 8351.—*Haymond v. State*, Ind., 119 N. E. 5.

46. **Injunction**.—**Equity**.—Where an infant wife separately acknowledged a homestead conveyance, the grantee's bill to enjoin an action in ejectment by the husband against him had no equity, since he had a complete defense to the action.—*Sims v. Gunter*, Ala., 78 So. 62.

47. **Insurance**.—**Assessments**.—If insured in fact paid one assessment with which the assessment plan company did not credit him, and the company thereafter failed to send him notices of assessments, he was thereby relieved from paying assessments, and it was proper to instruct that he could recover if paid the first assessment which the insurer alleged he had not paid.—*Rasch v. Bankers' Life Co. of Des Moines*, Iowa, Mo., 201 S. W. 919.

48.—**Assessment Plan**.—In an action on assessment plan policy, where the insurer set up failure to pay a call consisting of three items, instructions using the word "assessment" were not necessarily erroneous, especially where the parties throughout the trial used such word to designate the entire call.—*Rasch v. Bankers' Life Co. of Des Moines*, Iowa, Mo., 201 S. W. 919.

49.—**Beneficiary**.—Upon delivery and acceptance of life policy promising to pay to insured's second wife for her sole use if living, or if not living to "their children," insured's son by first wife took an interest contingent upon his and insured's surviving primary beneficiary.—*Pape v. Pape*, Ind., 119 N. E. 11.

50.—**Burglary**.—Subletting part of his loft by a manufacturer of ladies' waists to a manufacturer of embroideries was a violation of a clause in a burglary policy that premises should not be occupied for any other purpose than that specified.—*Liss v. United States Fidelity & Guaranty Co.*, N. Y., 169 N. Y. S. 1027.

51.—**Foreign Corporation**.—A clause in a life policy, issued by a foreign insurer licensed to do business in Missouri, which provided that loans could be obtained by the insured on the sole security of the policy, imposed no obligation on the insurer to make such loans, if the Missouri statute applied and prohibited hypothecation of the reserve as security.—*New York Life Ins. Co. v. Dodge*, U. S. S. C., 38 S. Ct. 337.

52.—**Fraternal Society**.—Where Massachusetts Attorney General did not consent to dissolution of fraternal benefit society organized under laws of Massachusetts, etc., federal court could not grant relief at suit of non-resident members; St. Mass. 1911, c. 628, §§ 24, 25, having been in force when contracts of insurance were entered into, and thus having become part thereof.—*Cummings v. Supreme Council of Royal Archmum*, U. S. D. C., 247 Fed. 992.

53.—**Incontestability**.—In action on life policy, providing that it should be noncontested after two years, insurer could not set up breach of warranty, where more than two years had expired, although insured died before such time.—*Monahan v. Metropolitan Life Ins. Co.*, Ill., 119 N. E. 68.

54.—**Malpractice**.—That insurance company has insured physician against malpractice suits by "Physician's Liability Policy" does not permit one suing physician for malpractice to join the company as defendant; plaintiff having no right

of action against the company.—*Bowers v. Gates*, Mich., 166 N. W. 880.

55.—**Open Policy.**—Open policy insuring automobile against theft, etc., from noon on certain day to noon of later date, construed with certificates keeping policy in force from August 30, 1913, to September, 1913, held in force from noon of August 30th, to noon of September 30th.—*Troy Automobile Exch. v. Home Ins. Co.*, N. Y., 169 N. Y. S. 796.

56.—**Total Loss.**—There need not be an absolute extinction of all the parts of a building in order for it to be "wholly destroyed."—*Horline v. Royal Ins. Co., Limited, of Liverpool*, Mo., 201 S. W. 958.

57.—**Waiver.**—An accident association did not waive its rights under forfeiture clause by accepting premium for policy's renewal where insured was not then engaged in prohibited occupation, although he had previously been so engaged.—*Interstate Business Men's Acc. Ass'n v. Greene*, Ark., 201 S. W. 799.

58. **Intoxicating Liquors.**—*Interstate Transaction.*—Evidence that accused was employed to transport intoxicating liquors through Alabama in transit from Georgia to Florida by automobile to make a test case, and that such method of transportation was unusual, held to make jury question whether defendant's engagement in interstate commerce was bona fide or subterfuge to avoid Alabama prohibition laws.—*Morgan v. State*, Ala., 78 So. 98.

59.—**Residence District.**—Where building had been used as a saloon for many years, and it was east of a blacksmith shop, immediately north of business houses, and south of residences, it was in the "business district," and consent of property owners within 300 feet was not required under the Warner-Crampton Act, § 37.—*People v. Kirchoff*, Mich., 166 N. W. 944.

60. **Licenses—Occupations.**—Under Charter of St. Louis, art. 3, § 26, cl. 5, giving power to license, regulate, or tax certain named occupations "and all other business trades, avocations or professions whatever," applies to one dealing in used bottles, whether his occupation be specifically named or not.—*City of St. Louis v. Baskowitz*, Mo., 201 S. W. 870.

61.—**Regulation.**—The state may not prohibit the lawful business of purchasing milk or cream, but it may regulate a business, however honest in itself, if it may become a medium of fraud, compelling honesty by imposing a license fee if widespread frauds upon and losses by its people are prevented.—*People v. Beakes Dairy Co.*, N. Y., 119 N. E. 115.

62.—**Occupation Tax.**—Where one has paid a merchant's tax, both state and city, the exaction of a junk merchant's occupation tax also is not violative of the provisions against double taxation.—*City of St. Louis v. Baskowitz*, Mo., 201 S. W. 870.

63. **Malicious Prosecution—Probable Cause.**—Where defendant in action for malicious prosecution fully and fairly stated all material facts to prosecuting attorney, and attorney advised making complaint and instructed justice of peace that warrant might issue, defendant cannot be deemed to have acted without probable cause.—*Thomas v. Bush*, Mich., 166 N. W. 894.

64. **Mandamus.**—**Pleading.**—A petition for mandamus for restoration to office must show existence of office where created by ordinance, his legal right thereto, the ordinance should be properly pleaded, and he must show he is a de jure officer.—*People v. Coffin*, Ill., 119 N. E. 54.

65. **Master and Servant—Child Labor Act.**—Under Child Labor Act, forbidding employment of child under 16 and over 14 years without age certificate, employer of child between such ages injured in course of employment may plead and prove contributory negligence.—*Flores v. Steeg Printing & Publishing Co.*, La., 78 So. 119.

66.—**Course of Business.**—When injuries from an assault by one employee upon another arise out of or are incident to protection by the injured servant of the person, property, or interest of the employer, compensation may be awarded, but not where the assault does not serve those ends.—*Jacquemin v. Turner & Seymour Mfg. Co.*, Conn., 103 Atl. 115,

67.—**Course of Employment.**—Where one servant at work as riveter's helper was seized by another, who held an air hose to his rectum while a third turned on the air, injuring him, such injury arose in the course of, but not out of, his employment, as required for recovery under Workmen's Compensation Act.—*Tarpper v. Weston-Mott Co.*, Mich., 166 N. W. 857.

68.—**Independent Contractor.**—One contracting to move a boiler from one place to another, where no instructions were given as to route or manner of getting it there, was an independent contractor.—*Lake v. Bennett*, R. I., 103 Atl. 146.

69.—**Negligence.**—Negligence of foreman of express company, in charge of placing of goods on platform for shipment, in not using reasonable care to so place goods as not to subject servants to unnecessary danger, is negligence of company.—*Maguire v. Barrett*, N. Y., 119 N. E. 79, 223 N. Y. 49.

70.—**Pleading.**—Where plaintiff alleged that defendant permitted an automobile to be driven by his agent so as to strike plaintiff, proof of the ownership of the automobile was admissible as tending to show that defendant did permit such driving, though it was not specifically alleged that defendant owned the automobile.—*Edwards v. Yarbrough*, Mo., 201 S. W. 972.

71.—**Respondeat Superior.**—Employee of logging company, using hand car on its railroad to go home from work after working hours, was not, at time of his death in collision with train, an employee of logging company or subsidiary railroad.—*Kendall Lumber Co. v. State*, Md., 103 Atl. 141.

72.—**Safe Working Place.**—Window and stick inserted against window sash a few feet from machine at which wire factory employee was working, held part of his working place within Laws 1911, c. 88, § 3, relating to risks of employment due to defective working places, etc.—*Indiana Steel & Wire Co. v. Studes*, Ind., 119 N. E. 2.

73.—**Workmen's Compensation Act.**—As Workmen's Compensation Act does not provide compensation for occupational diseases, plaintiff employed as mahogany stainer, an occupation necessitating his getting his hands into staining solution, could not recover for an infection to his hand; there being no evidence of an accident in course of employment.—*Jerner v. Imperial Furniture Co.*, Mich., 166 N. W. 943.

74.—**Workmen's Compensation Act.**—Industrial Accident Board has no jurisdiction of servant's claim for compensation under Workmen's Compensation Act, where servant was employed upon a car ferry in interstate commerce when accident occurred.—*Thornton v. Grand Trunk-Milwaukee Car Ferry Co.*, Mich., 166 N. W. 833.

75.—**Workmen's Compensation Act.**—The owner of a hotel is not pursuing his business within meaning of Workmen's Compensation Act when he causes rooms to be occasionally painted and decorated, although it is usual to have work of that nature done from time to time.—*Holbrook v. Olympia Hotel Co.*, Mich., 166 N. W. 876.

76.—**Workmen's Compensation Act.**—A janitor in defendant's office building, who lived in a house rented from defendant at some distance from the office building, who was killed by a charged electric wire falling across his lawn just as he was leaving his home to go to work, was not killed upon "the premises or at the plant" of his employer, within Workmen's Compensation Act, § 3, subd. 4.—*Murphy v. Ludlum Steel Co.*, N. Y., 169 N. Y. S. 781.

77. **Mortgagors—Foreclosure.**—In suit to foreclose mortgage which correctly described 40-acre tract, omitted by clerical misprision from decree of foreclosure, court could properly proceed, though copy of mortgage, an exhibit, did not include such tract, by amending decree of foreclosure and sale prepared for entry of record to include tract.—*Blasingame v. Lowdermilk*, Ark., 201 S. W. 807.

78. **Municipal Corporation—Civil Service Law.**—Repeated appropriations by a city for the salary of an "expert on system and organization" and action of civil service commissioners in

certifying plaintiff to said position, and his appointment and acceptance in pursuance of the Civil Service Law, show a legal employment.—*People v. Coffin*, Ill., 119 N. E. 54.

79.—Contributory Negligence.—Contributory negligence of pedestrian proceeding diagonally across 30-foot street, with his back towards vehicles to be expected on that side of street, with his coat collar up and his head down, not only failing to look, but apparently engrossed in thought, held to bar recovery for his death by being struck by automobile.—*Fulton v. Mohr*, Mich., 166 N. W. 851.

80.—Instructions.—In an action for the death of a pedestrian, struck by an automobile on a city street, failure to instruct that defendant owed a duty to pedestrians to give audible warning of his approach was reversible error, in view of Pub. Acts 1909, No. 318, § 7, subd. 2, and section 6, subd. 1.—*Johnston v. Cornelius*, Mich., 166 N. W. 983.

81.—Motor Vehicles.—Where two motor vehicles approach each other on a city street, if it is impracticable for one of them to turn to the right, without crossing the path of the other, it is his duty to stop.—*Edwards v. Yorrough*, Mo., 201 S. W. 972.

82.—Public Highway.—Public highways belong to public, and there is no such thing as the rightful, private, permanent use of a public highway, and one who uses a public highway for his own private use commits indictable public offense, though he does so with permission of municipal authorities.—*City of Troy v. Watkins*, Ala., 78 So. 60.

83.—Resulting Damage.—Where illuminating and heating company had laid its conduits in public alley, contractor, excavating basement partly in alley so as to cause cave-in injuring such conduits, was liable for resulting damage.—*Edison Illuminating Co. v. Misch*, Mich., 166 N. W. 944.

84. Names—Presumption.—The fact that the name of one signing as a notary appeared to be that of a woman is not conclusive that the officer was of that sex.—*Terry v. Klein*, Ark., 201 S. W. 801.

85. Negligence—Proximate Cause.—Where defendant, a member of a municipal body, was invited by their engineers to examine sewage disposal plants, and while inside a "septic tank" was killed by explosion of gas, when third person lit a match in disregard of warning, act of third person was the proximate cause of death.—*La Rue v. Potts*, N. J., 103 Atl. 197.

86. Principal and Agent—Attorney and Client.—Solicitor employed to report on title deeds, transact legal matters, etc., was a special agent whose agency could not be enlarged by receiving additional money from borrower to apply on liens on borrower's land, so as to make employing association liable for his misappropriation of such money.—*Scherer v. Post Office Building & Loan Ass'n*, 103 Atl. 202.

87.—Traveling Salesman.—A traveling salesman for a milling company, supplied with sale blanks, had no apparent authority to compromise a claim for damage for goods not shipped, so that a compromise made by him was no defense to an action for the price of other goods.—*Dahneke-Walker Milling Co. v. T. J. Phillips & Sons*, Miss., 78 So. 6.

88. Railroad Crossing.—Where plaintiff, a child of ten, was injured at a railroad crossing, she being lawfully upon the highway, a general allegation of negligence is sufficient as against demurral.—*Chicago, T. H. & S. E. Ry. Co. v. Barnes*, Ind., 119 N. E. 26.

89.—Closing Street.—Where railway company and city agreed that certain public streets should be used exclusively by company, and that in lieu thereof company should maintain on its own land certain other streets designated as private streets which contract has been ratified by Legislature, neither company nor its successor can close street so designated or prevent abutting owners from using it.—*Grell v. Stollenwerck*, Ala., 78 So. 79.

90.—Look and Listen.—The driver of automobile should not permit his car to proceed to a point where approach of train cannot be observed or noted in time to avoid danger.—*Roth-*

rock v. Alabama Great Southern R. Co., Ala., 78 So. 84.

91.—Proximate Cause.—Where crossing collision killed a horse, destroyed a wagon, and scattered its contents, which were probably stolen, and the driver, who was alone in charge, was stunned, jury might find that collision was proximate cause of loss of contents of wagon.—*Brower v. New York Cent. & H. R. R. Co.*, N. J., 103 Atl. 166.

92. Receivers—Auditing Accounts.—Where receiver was authorized to carry on a company's business, expense of audit, and receiver's authorized certificates should be paid in full as part of costs prior to distribution.—*Pennsylvania Engineering Works v. New Castle Stamping Co.* Pa., 103 Atl. 215.

93. Sales—Description of Property.—Where advertisement for sale of cattle catalogued the animals, and stated "every animal of breeding age catalogued in this sale has been a regular breeder," and plaintiff told defendant that he desired to buy some cows for breeding purposes, and defendant's agent told plaintiff that a cow which he later bought was then with calf, there was a warranty that the cow was a breeder and then with calf.—*Blair v. Hall*, Mo., 201 S. W. 945.

94.—Mutuality.—Contract based on letter stating, "You may enter our contract for a minimum quantity of one hundred twenty tons, maximum quantity of one hundred forty-five tons" of paper specifying the prices and terms held not void for uncertainty or lack of mutuality.—*Southern Pub. Ass'n v. Clements Paper Co.*, Tenn., 201 S. W. 745.

95. Specific Performance—Evidence.—Where it was merely question of surmise whether, if defendants had complied with their portion of agreement, foreclosure could have been avoided, specific performance of agreement to exchange lands will not be decreed, where complainant had lost title to land he was to convey by mortgage foreclosure.—*Winston v. Brown*, U. S. C. A., 247 Fed. 948.

96. Trusts—Power of Appointment.—Where grantor conveyed land in trust for himself and wife for life, with remainder over on death of survivor, and directed trustee, on wife's written request, to convey on such terms as she directed, the power contemplated only a bona fide and valid sale for a sufficient valuable consideration, and did not authorize conveyance as a gift or upon a nominal consideration.—*Taylor v. Phillips*, Ga., 95 S. E. 289.

97. United States—Injunction.—Where Postmaster General, acting under Appropriation Act March 9, 1914, authorizing expenditures for experimental deliveries, determined in interests of service that experiment should be conducted at Washington, D. C., and First Assistant Postmaster General, as authorized by its terms, notified plaintiff in writing of cancellation of contract for collecting and delivering mail in Washington, plaintiff's suit to enjoin annulling contract must be deemed one against United States.—*Wells v. Roper*, U. S. S. C., 38 S. Ct. 317.

98. Vendor and Purchaser—Option.—Where defendants' ancestor in title gave option to college trustees to take so much land as they "may choose for a reservoir site," the choice was with the grantee, and it could not be limited in its choice to prepared plans or present needs.—*Trustees of Hamilton College v. Roberts*, N. Y., 119 N. E. 97, 223 N. Y. 66.

99. Waters and Water Courses—Riparian Rights.—A grant of "all the riparian rights" in grantor's land, when limited "for the purpose specified," and "confining the flowage to the height of the dam," gave grantee only rights in grantor's land as far as flowage affected it.—*Portland Sebago Ice Co. v. Phinney*, Me., 103 Atl. 150.

100. Wills—Bequest.—Where a testator bequeathed to two sisters "all I am worth, amounting to four thousand three hundred dollars or thereabout, which is now in possession of S. as trustee," the will covered only such fund, and the words "all I am worth" do not give it application to after-acquired property.—*Albert v. Safe Deposit & Trust Co. of Baltimore*, Md., 103 Atl. 130.

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ST. LOUIS, MO., JUNE 14, 1918

IMPOSSIBILITY OF PERFORMANCE BY REASON OF CHANGE OF CIRCUM- STANCES, NOT PROVIDED FOR, AS A DEFENSE TO AN ACTION FOR BREACH OF CONTRACT.

In 86 Cent. L. J. 349 we noticed the case of *Tenants Limited v. Wilson*, 116 L. T. Rep. 780, a decision by the House of Lords, in which case it was held, that, where as a result of war there was such a partial destruction of the subject-matter of contract as to make it practically impossible for delivery of goods contracted for to be made at the times specified, the contract was suspended in its operation.

Since that ruling was made other cases have come before the British courts concerning contracts affected by the outbreak of war, and the contracts were necessarily affected thereby. In one of such cases lately decided in King's Bench Division, McCordie, Judge, reviews at great length the cases with the result, that he concludes, that where there is no question of trading with the enemy; nor any administrative intervention by the British Government, the mere impossibility of performance does not work dissolution of a contract. *Blackburn Robbin Co., Limited, v. Allen*, 118 L. T. Rep. 222.

The facts of this case show that early in 1914, sellers agreed to deliver to purchasers different standards of Finland birch timber from July to November. In August imports of timber from Finland stopped, because of German vessels traversing the Baltic sea and disorganizing transportation. This "undoubtedly effected a revolution of circumstances and rendered it impossible for the defendants to deliver the timber in accordance with their bargain. * * * The defendants asserted for the first time in July, 1916, that

the contracts had been dissolved by the outbreak of war in 1914."

The judge refers to *Paradine v. Jane*, 1647, Aleyn, 26, in which "the original rule of English law was clear in its insistence, that where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This rule became part of our common law and whatever fluctuation therefrom may have occurred in English decision, with regard thereto, occurring since revolutionary days, is to be taken by us more as persuasive than binding. We must look to our own decisions, therefore, to ascertain what modification of the rule in *Paradine v. Jane*, if any, has been introduced into our law, especially as Judge McCordie says "the first true modification of the original rule was created, I think, by the doctrine of commercial frustration." *Jackson v. Union Marine Ins. Co.* (1873), 31 L. T. Rep. 789, 8 C. P. 572.

In this case it was said by Brett J., that: "Where a contract is made with reference to certain anticipated circumstances, and where without any default of either party, it becomes wholly impossible of application to any such circumstances, it ceases to have any application, it cannot be applied to other circumstances which could not have been in the contemplation of the parties when the contract was made." The *Allen* case *supra* says: "If these words of Brett J. are applied in their widest extent they may well effect a revolution in contract law."

In other English cases the original rule was held modified by holding that a contract is dissolved by destruction of its subject-matter. *Taylor v. Caldwell*, 8 L. T. Rep. 356, 3 B. & S. 8260. And this doctrine was extended by *Krell v. Henry*, 1903, 89 L. T. Rep. 328. This case has been frequently cited with approval by House of Lords,

The Krell case held, that a collateral matter may become the basis of the contract and, it ceasing to be, the contract is dissolved.

The collateral matter referred to was the taking place on a certain day of the coronation procession, for the viewing of which a window was rented during daylight of certain days. The coronation was postponed. Parol evidence was held admissible to show its taking place was the foundation of the contract. It was said: "It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated and ought to have guarded against the event, which prevented the performance of the contract."

In the Allen case the judge asks what are the limits of the Krell v. Henry Rule and he says: "To supply an answer to the above question is a task of great difficulty in the absence of any authoritative guidance. * * * It calls for the ever-embarrassing duty of deciding whether an implied term shall be read into a given contract to the effect that dissolution shall take place if an unanticipated and serious change of circumstances occurs."

He concludes that the Krell case does not apply to a bare sale of unascertained goods, "even though there has been so grave and unforeseen a change of circumstances as to render it impossible for the vendor to fulfill his bargain." He says: "If I were to hold otherwise I should create a rule the extent of which no man can foresee, and to the operation of which no judge can satisfactorily fix the limits. By stating the above conclusion I maintain the original rule of English law, whereby a man is bound by his contract, whilst I leave a field, as yet undefined, for the operation of the Krell v. Henry principle."

In this country we are bound by the rule in the Parradine case announced in 1647, and so far as sale of unascertained goods

is concerned we perceive there has been no modification thereof in English decision, unless the case discussed by us in 86 Cent. L. J. *supra* creates a modification. That case, however, only accomplished a suspension of the contract and not an abrogation of its terms. There, too, was a "force majeure" clause in the contract.

American law seems far from settled in a question of this kind, so far, at least, as regards delivery of goods at the time of the contract unascertained. Now it has been said that: "There are many cases holding that the continued existence of the means of performance, or of the subject-matter to which the contract relates, is an implied condition, and the rule seems to rest on the presumption that the parties necessarily intended an exception." *Dolan v. Rogers*, 149 N. Y. 489, 493, 44 N. E. 167. But there are abundant cases to the contrary. Thus prevention by a foreign law does not excuse performance. *Williston on Sales*, §661, note 35 citing cases.

This author says, however, that: "It is probable that the tendency of the law is toward an enlargement of the defense of impossibility, and in any case, where it may fairly be said that both parties assumed that the performance of the contract would involve the continued existence of a certain state of affairs, impossibility of performance due to a change in this condition of affairs will be an excuse." But the mere making more onerous performance will not operate as an excuse, especially in commercial contracts for future deliveries, where there is an element of speculation involved, or a fluctuation in prices may come about. A claimed impossibility will be regarded less tolerantly, than in other contracts.

Since the Allen case *supra* was decided, the Appeals Court has held that the Wilson case did not control the ruling in a case quite similar in its facts to the Allen case. *Dixon & Sons Limited v. Henderson Craig & Co.*, 118 L. T. Rep. 328.

NOTES OF IMPORTANT DECISIONS.

COMMERCE—INTENT BY SHIPPER AS TAKING GOODS FROM UNDER COMMERCE CLAUSE.—In *State v. C. C. Taft Co.*, 167 N. W. 467, decided by a majority of five to two, it is held, that intent of dealer to dispose of goods shipped in interstate commerce to break original packages and sell them to the trade where they are received takes the goods from under the shelter of the commerce clause of the constitution and makes them subject to seizure under law enacted by virtue of a state's police power.

While it is true that it has been held by federal supreme court that when property shipped in interstate commerce comes to "rest" in the state to which it has been shipped, yet it is conceded, that U. S. Supreme Court has never held, that mere intent of consignee to break original packages and distribute their contents to retailers or among consignees' own retail stores, constitutes the "rest" spoken of. There are, however, two cases by Maine Supreme Court to the effect, that there is presumption of continuance of intent, and this intent puts the property in the general mass of property in the state. *State v. Blackwell*, 65 Me. 556; *Wasservolk v. Boulier*, 84 Me. 165, 169, 24 Atl. 808, 30 Am. St. Rep. 344. There also is cited federal authority to the general effect of presumption of the continuance of intent. *Cook v. Marshall County*, 196 U. S. 261, 271, 25 Sup. Ct. 233. This case, however, is but a principle used *arguendo* by U. S. Supreme Court. The Maine court held that "a fixed intent that the package shall be broken and sold must place the liquors in the same category," that is of packages actually broken.

The prevailing opinion and the dissent refer to *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 517. The former says the inquiry "was as to whether the owner's state of mind in relation to the goods—that is his intent to export them and his partial preparation to do so—exempt them from taxation." That case concerned taxation in the state where shipment was begun and it was said, in the instant case, that the *Coe-Errol* case held that "mere intent is not enough, but the intention must concur with an act of transportation to terminate the jurisdiction of the state."

The dissent construes the *Coe-Errol* case as conclusive against intent alone affecting the status of the property. It was said: "If intent to do what will give property the federal protection does not effect such protection, then

an intent to do what, if done, will take property out of interstate commerce cannot destroy the protection. * * * The *Errol* case over and again declares it is dealing with what will create a status. * * * It decides nothing except whether intent will create a status."

It seems to us that the dissent's better founded than the ruling by the majority. The natural position of property is, however, subject to local jurisdiction and acts putting it outside of that jurisdiction creates an exceptional situation, and for this reason there may be a difference in the effect of intent. But the general operation over the entire country of such exception, especially when that is under a constitution of an independent sovereignty, requires just as conclusive certainty as where property is to be exempted from jurisdiction naturally controlling it. Disputable intent ought never to present occasion for conflict between federal and state authority.

CONTRACT—CONDITION IN RESTRAINT OF ALIENATION.—*Robinson v. Thurston*, 248 Fed. 420, decided by Ninth Circuit Court of Appeals, holds, that where for a nominal consideration a daughter executed to her mother a release of indebtedness evidenced by notes and mortgages in a large sum upon condition that if such releasee incurred any indebtedness to the amount of \$1,000 at any one time or mortgaged or sold any of her real estate without first obtaining the consent of the daughter, said release and discharge of such notes and mortgages would be null and void and the amounts represented by such notes and mortgages become due and payable, the incurring by the mother of indebtedness in such sum of \$1,000 and conveying of a portion of her real estate, revived and made enforceable the said notes and mortgages.

The Court of Appeals goes upon the theory that there was but a suspension of the indebtedness to the daughter and there was no sound reason against its revival and enforceability, as in the condition of revival there was nothing unconscionable nor contrary to public policy.

This condition certainly operated against the free right of alienation. And it was said that this restriction upon alienation had no injurious influence over the community at large and no one outside of the parties had any interest in its suppression. But, it is difficult to discern what legal right the daughter had in the observance of the condition. If this was to preserve for the daughter any right in the prop-

erty of her mother, it might be seen wherein the daughter could be damaged by non-observance of the condition. But, if the condition merely stood for the daughter's solicitude for her mother or because she was afraid that her extravagance would or might entail a burden on the daughter, we do not think this could stand as a valid reason for reviving the suspended or cancelled indebtedness. There appears lacking the element of necessary mutuality to sustain this agreement for a revival of the indebtedness. While it may be true, that strictly there is no public policy, which would refuse to recognize the validity of the contract for a revival of indebtedness, yet we think there was no mutuality which is necessary for the sustaining of contracts.

We doubt whether any of the cases cited by the court were lacking in the particular of mutuality.

CONFLICT OF LAWS—PRESUMPTION OF LAW OF FOREIGN STATE IN ABSENCE OF EVIDENCE.—In *Lillard v. Lierley*, 202 S. W. 1057, decided by Springfield (Mo.) Court of Appeals, it was held that, where it was stipulated that defendant in an action on a promissory note left Nebraska shortly after the note matured and ever since lived in Missouri up to the time he was sued and, further stipulated that under the Nebraska law a cause of action on promissory notes is barred by limitation of five years, yet the principle that the law of another state, where there is no showing to the contrary, will be presumed to be that the forum of suit, imported into the case the same exception as to the running of the statute for absence from the state as was found in Missouri law, and the action was thereby saved.

The court said: "It has been universally held that where a cause of action accrued in a foreign state and the local laws of such state are not shown, and it is such a state in which we could not presume that the common law was in force, we could and would apply the law of Missouri, both statutory and constructive."

In this case it appears, that defendant pleaded that the action was barred under statutory limitation as under Nebraska law, and there was no reply to this plea. Then there was a stipulation as above stated. In oral argument plaintiff contended that there was an omission by mistake and oversight in the agreed statement of facts to further show an exception during the time defendant lived in Missouri, in which the statute did not run and his counsel

asked that this exception under Nebraska law be given consideration.

The court ruled that Nebraska law outside of what was stipulated about could not be considered, but under the principle above stated, Missouri law could be taken into account.

It seems to us that by both the pleading and the agreed statement of facts the entire applicable law was included. Therefore this was not a case where the law was not shown. It was shown, and presumptively it was shown in its entirety.

In pleading the statute of another state there is no presumption that such statute is the same as that of the forum and exceptions of local statutes cannot be implied where the foreign statute is silent even in the absence of proof of the entire statute law on the subject of inquiry.

DECISIONS OF THE BRITISH COURTS ON THE POSITION OF MORTGAGES DURING WAR.

One of the earliest emergency measures of the war was the Courts (Emergency Powers) Act passed on 31st August, 1914. We are now in 1918, and in the interval several amendment Acts have been passed. But one of the main provisions of the original Act still stands, namely, that affecting mortgages granted prior to the war. The amount of these must be enormous, and there is no doubt that, with the government offering to borrow at five per cent and on the best security, it was a wise financial measure to control the calling up of mortgages; even though this has resulted in certain minor economic effects not wholly without question.

The act in effect as regards mortgages lays it down that no person shall take, resume, or enter into possession of any property, exercise any right of re-entry, foreclose, or realize any security (except by way of sale by a mortgagee in possession) except after an application to the court.

The functions of the court when application is made are defined in the second sub-

section, which enacts that if on application, the court is of opinion that time should be given to the person liable to make the payment on the ground that he is unable immediately to make the payment by reason of circumstances attributable, directly or indirectly, to the war, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, by order, stay execution, or defer the operation of any such remedies as aforesaid, for such time and subject to such conditions as the court thinks fit.

While therefore it is clear that a mortgagee, before he can take any steps to enforce his security, must apply to the court for leave to enforce his remedies, yet how will the court exercise its discretion towards him: has he a case for suitable application; need he apply at all? The vague terms of the statute created a feeling of uncertainty as to result; and it is on that account that the recent decision of Mr. Justice Eve in *Re Jobson's Application*¹ should be welcomed not only by lawyers, but by all business men and by mortgagors and mortgagees themselves. He has, in brief, as one commentator puts it, "furnished the profession with a kind of *vade mecum* on the question of the mortgagees' position."

The learned judge seems to have resolutely addressed himself to the question—what lines ought the judicial discretion to follow when application is made by a mortgagee. His Lordship first pointed out the various courses which a mortgagor faced which a demand for payment can pursue. He can realize the property and pay off the mortgagee out of the proceeds; or he can pay off the sum out of his other resources and take a reconveyance; or he can arrange a transfer. "The last of these courses," the learned judge observed, "is the one usually adopted, and, indeed, it is almost inevitable where the advance is of a large amount, which is treated as capital more or

less permanently borrowed for business purposes at a fixed and moderate rate of interest." The practical course, then, in dealing with an emergency application is to consider how, under ordinary circumstances, the particular security would be dealt with; and since it is unusual for the mortgagor to be in a position at once to find the money himself, and he will require to raise it elsewhere, a reasonable time should be allowed him for this purpose; reasonable, that is, having regard to the special circumstances of the times.

Having thus established a basis—principle, Mr. Justice Eve proceeded to illustrate it by seven special instances as follows: We give the summary of them compiled by *The Solicitors' Journal*; (1) when the security is sufficient, and the mortgage obligations (other than the covenant for payment of principle) have been performed to date, the mortgagor ought to be given a reasonable time to pay the debt; (2) this time may be extended if he is willing, where the interest is less than five per cent to pay five per cent, and still further, if he will pay to the mortgagee on account of principal any excess of net rents over interest; (3) if the mortgagor is in occupation, he should pay five per cent, interest and account in the same manner for any excess over that sum of a proper occupation rent; (4) if the security is insufficient, but the mortgage obligations have been observed, the mortgagor should be allowed an extension, but with liberty for the mortgagee to renew the application in the event of further depreciation; (5) if in such a case there are slight arrears of interest, the mortgagor should be required to clear them off as a condition of extension of time; (6) if in cases (4) and (5) the rent or a proper occupation rent exceeds five per cent, the mortgagee should, if he desires, be allowed to appoint a receiver; and (7) where there are substantial arrears of interest, or where the covenants have been broken, the mortgagor should have no relief except on terms of clearing the arrears

(1) 117 L. T. Rep. 786.

or making good the breaches, and then he could have extension as in cases (4), (5) and (6).

We feel sure these examples will prove of the highest usefulness. True, the statute is declared to be temporary only, but we fear its embargo will have to remain for a considerable time after the war; even its terms may have to be made more restrictive should the war be still further prolonged.

DONALD MACKAY.

Glasgow, Scotland.

COURT OPINIONS AND REPORTS.

The American Bar Association passed a resolution directing that a memorial be presented to the appellate court and to the individual judges, suggesting fewer and shorter opinions. This question concerning the brevity and non-publication of judicial decisions is, therefore, raised to the dignity of a national problem.¹

Of course, we know from experience that resolutions are often passed by the most learned bodies because somebody presents them; and, also, something has to be done to show that members are abreast of the times. Although it is generally conceded that some courts have been too prolix and discursive in their opinions, and that *per curiam memoranda* at the end of the volume might have properly disposed of many cases, nevertheless, it is very doubtful whether a satisfactory remedy can be found by applying a Procrustean rule—chopping off decisions at given lengths and suppressing others entirely.

It is apparent that the memorial takes too pessimistic a view of present court reports, for it is said: "Unless the problem is seriously attacked it is not improbable that in the near future the burden of accumulated precedent will become not only

serious, but insupportable. Indeed, it may ultimately jeopardize our whole theory of customary, as distinguished from codified law, and may impair, if not destroy our doctrine of sanctity of judicial precedent."

No doubt the author of the memorial believed that it was necessary to overstate his case, in order to attract attention, as lawyers are inclined to do when addressing a jury. The memorial enumerates four grounds as a basis for reformation:

1. To shorten opinions by recognizing brevity as a virtue next to clarity.
2. To avoid duplicate citations; diffusive discussions of principles and lengthy quotations.
3. To state the facts concisely.
4. To write fewer "reasoned opinions" and more *per curiams*.

These propositions, except the fourth, are self evident; apparently any judge should follow them; but the difficulty lies in the application. What appears to be a concise opinion to one judge or lawyer, may seem to be diffuse to another. Perhaps, in referring to celebrated cases we may glean some idea from which to determine what is the proper length of a court decision. The Dred Scott case² covers 240 pages of the official report, but it involved great national issues. All of volume 126 U. S. Reports is taken up with the Telephone Cases. Whether Chief Justice Waite was justified in writing such a long opinion, may be viewed differently; also, it must be admitted that the case was of supreme importance, as it determined the validity of conflicting patents, and could not be presented briefly.

Lord Holt decided Coggs v. Bernard³ which is a landmark in the law of bailments. It is certainly a model decision, reported on 25 pages. Marbury v. Madison is found⁴, 43 pages, wherein Marshall established the doctrine that courts may declare a statute unconstitutional. The Dartmouth

(1) Am. Bar Association Journal, IV, p. 15.
January, 1918.

(2) 19 Howard 393.

(3) 2 Ld. Ray 909.

(4) 1 Cranch, 137-180.

College case⁵ covers 197 pages, which holds that a charter is not subject to change by act of the legislature. *Vidal v. Girard Estate*, sustaining the Stephen Girard will, is reported⁶ in 75 pages; the decision is by Judge Story, one of the most scholarly and careful of jurists. Lord Stowell, the ablest British admiralty judge, wrote the opinion in *The Grattitudine* in 1801, holding that a master may hypothecate a vessel's cargo to pay for repairs to a ship in a foreign port. As given in *Legal Masterpieces* it requires 15 pages or 25 pages of an ordinary report.

*State ex rel Davis v. Clausen, State Auditor*⁷, or 59 pages in all, is an able opinion by Judge Fullerton; the court determined the validity of the Workmen's Compensation Act. This ruling was approved in *State v. Mountain Timber Co.*⁸, 27 pages.

These decisions are all masterpieces of style and judicial logic. Has anyone ever heard a complaint that they were too lengthy? It, therefore, depends on the occasion and the subject-matter, whether an opinion should be long or short.

There is another view: counsel for appellant usually urges a number of points for reversal. It is not expected that the appellate court will pass on them *seriatim*, but appellant is entitled to have the material points determined. If that be not done, petitions for re-hearing are filed and often a second opinion is forthcoming, which might have been avoided if the court had been more elaborate or explicit in the first instance.

It is said that the U. S. Supreme Court decisions have lately averaged 2333 words, while the Circuit Court of Appeals for the ninth circuit exceeds the former by about 124 words, averaging 2457 words to each case.⁹ However, the U. S. Supreme Court has disposed of many cases by memoranda;

thus, in the last October term, 66 cases are reported on 8 pages of the "Advanced Opinions." A happy medium has been observed by the Washington State Supreme Court, having shortened the average decision one page as appears by comparison, for 3 Washington contains 787 pages, reporting 131 cases, averaging 6 pages; but 97 Washington reports 140 cases on 700 pages, or an average of 5 pages to a case. The Washington Constitution provides thus: "In the determination of causes, *all* the decisions of the Supreme Court shall be in writing, and the grounds of the decision shall be stated."¹⁰

Necessarily, a compliance with the Constitution leaves much latitude as to what a decision should be: whether the facts are to be elaborated or embellished; whether some wit at the expense of litigants, or a sly thrust at counsel is to be incorporated; whether the reasons are to be tersely or profusely expressed, must, of course, largely depend upon the literary taste, the attainments and personality of the judges.

Generations have heard of "the law's delay"; of "weary lawyers with endless tongues"; and of "garrulous judges"; but human nature has not changed perceptibly since the days of Solon, the lawgiver. Years ago there were clamors that there were too many law books and reports. The supposed evil is not a grievous reality for as new treatises and reports appear the old ones are sloughed off, as it were, at the other end. Time was when the New York Common Law and Chancery Reports were indispensable to every law office. Who cites them now outside of New York State? Few, indeed. 1 Wash. cites them 14 times; 92 Wash. not at all, and 97 Wash. only once. It is the same with text books. Bacon's *Abridgement* and Wait's *Actions and Defenses*, once so popular, are practically obsolete. The same may be said of the *American Decisions*, and *American Reports*.

(5) 4 Wheaton, 518-715.

(6) 2 Howard, 127-202.

(7) 65 Wash., 156-225.

(8) 243 U. S., pp. 219-246.

(9) See XXII Law Notes, 2.

(10) Art. IV, Sec. 2.

There is one important point, however, that is generally overlooked. A court opinion should be considered in a dual aspect: First, as a decision that settles the immediate controversy; second, as an authority affecting the determination of analogous subsequent cases. By reason of this situation there is bound to be a continuing conflict as to the length of decisions; for the litigants concerned want the issues fully discussed—it being of vital interest to them to have their rights carefully determined—while the legal profession, being only indirectly concerned, is clamoring for a brief resume of what the court actually decided. Of the two, it would seem that the litigant presents the better reason: he is in court to have his rights adjudicated, but is not interested in establishing precedents to be cited for the benefit of future litigants. Many decisions direct the lower court to enter some order or the parties to perform same act; often there is difficulty in carrying out the mandate of the appellate court; unless the opinion be explicit there is a further appeal to ascertain what was meant.

It is therefore, plain that litigants want their appeals properly determined without reference to the length of court opinions; the legal profession generally wants short decisions to save time in reading and expense. *Per curiam* opinions are hardly ever satisfactory to the attorneys or parties in the case; they are considered as a means of escaping personal responsibility for the authorship of the particular decision. The fact is, no litigant or lawyer on the winning side ever finds any opinion too long—for it is always pleasant reading. There is also some vanity connected with this; for the successful counsel has been heard to say that the court wrote an eight or ten page opinion in his case, which, of course, implies that the case was of great importance.

In Case and Comment for last March is a "Symposium on Writing and Reporting Opinions" by a score of Federal judges,

which discloses the fact that there is no unanimity in proposing a remedy, nor a common ground for any agreement among them. Most of the judges suggest shorter opinions and fewer for publication. Apparently, they all suffer from self-humiliation; but considering that the judges hold the remedy in their own hands, it appears to be much like other reform movements, in that it is much easier to urge reforms upon others than to reform oneself.

If opinions are really valuable the bar will not willingly permit them to pass into oblivion. For instance, Judge James V. Coffey became a member of the Superior Court of San Francisco in 1883. For over thirty years he had charge of the probate work. In that capacity he wrote many decisions, and although not buoyed up, nor made prominent through the prestige of a high court, yet by virtue of his learning and great ability as a judge, his decisions have attained renown and permanency on their merits, having been published in six volumes at \$5.00 each, and being of exceptional value to a practitioner. The case of Angeline R. Scott,¹¹ involving the validity of a will made by one acting under delusions, reported in 96 pages, is a philosophic discussion of mental diseases, and highly instructive. This demonstrates that it is the quality of judicial work which determines whether a case should be reported; and if the quality be of the best, very few will object to the quantity, as shown in the preface to volume six thus: "Such a cordial reception has been given to the first five volumes of Coffey's Probate Decisions, published six years ago, that the publishers now feel impelled to issue a sixth volume, to include opinions which have since been handed down by Judge Coffey."

From what has been said it may be asked: What is the proper length of a court decision? There is no fixed standard. A decision which concisely, definitely and legally disposes of the controversy before

(11) 1 Coffey Prob. Rep. 271.

the court, should meet the requirements of a good opinion, whether it be long or short. In cases involving questions of public policy, or statutory or constitutional construction, no doubt, a judge should be more elaborate than in matters affecting the litigants only. After all, we must depend upon the good sense of the judges as to the length and style of their decisions.

To the complaint that reports are too numerous, one may answer: that modern ingenuity has come to the rescue. It is not necessary that a lawyer should fill his library with reports from every jurisdiction. Cases of importance upon almost any conceivable proposition may be found collated and digested in various publications; chief among them are the Lawyers' Reports Annotated, and the American and English Annotated Cases. Here is a domain of law, as abundant with precedent and as full of authorities—"as leaves in Vallombrosa". Not only this: if any one desires an epitome of these leading cases, and an absolutely reliable review of pertinent authorities he may be instantly accommodated by the use of Ruling Case Law; and in addition refer to the various Cyclopedias and Digests; besides, the Central Law Journal and other periodicals are of the greatest value in keeping posted on current legal thought and literature. With these modern devices to aid a practitioner or the judge, what matters it whether decisions are long or short, or how numerous they may be?

Recurring to the alarming part of the memorial, that "code law may supersede the common law"; it may be suggested, if length of decisions determines that fact, then our present system is based upon shaky foundations and ought to be superseded by something more substantial. As to the "sanctity of judicial precedent" that cannot be destroyed by long opinions, but depends upon the judges themselves.

While the courts administer the law with due regard to justice, honestly and wisely

—without fear or favor—they will enjoy the confidence and have the loyal support of the people, without regard to the length of their decisions. The writer's view is tersely expressed by Justice Oliver Wendell Holmes, a real legal philosopher, in his remark: "If the chance of battle—I may add, the passage of a law—has ruined a state, there was a general cause at work that made the state ready to perish by a single battle or law. Hence, I am not much interested one way or the other in the nostrums now so strenuously urged."¹²

FRED H. PETERSON.

Seattle, Wash.

(12) Holmes' Speeches, p. 102.

BANKS AND BANKING—FORGERY

STATE, for Use of ARKANSAS PENITENTIARY, v. BANK OF COMMERCE.

Supreme Court of Arkansas. April 15, 1918.

(202 S. W. 834.)

The weight of authority is that the drawee who unwittingly pays a check to which the payee's signature is forged is not liable to the payee in the absence of acceptance of the check.

Action by the State, for the use of the Arkansas Penitentiary, against the Bank of Commerce. Judgment dismissing the complaint, and plaintiff appeals. Affirmed.

Smith, J.: The complaint in this cause contained the following allegations:

"That on November 27, 1916, Landauer Bros. Cotton Company of Little Rock, Ark., executed its check upon the defendant, the Bank of Commerce, in the sum of \$5,000, payable to the order of the Arkansas State Penitentiary, said check being in part payment of certain cotton sold to the said Landauer Bros. Cotton Company by the state board of penitentiary and reform school commissioners; that on said date said check was delivered by said Landauer Bros. Cotton Company into the hands of R. G. Anderson, who was at that time the clerk of the said state board of penitentiary and reform school commissioners; that on said date the said R. G. Anderson, wholly without any authority or right so to do, indorsed said check and presented it to the defendant, the Bank of Commerce, and the said defendant then and

there wrongfully and without any right or authority whatsoever paid to the said R. G. Anderson the \$5,000 in cash, and then and there charged said check against the account of the said drawers thereof, the said Landauer Bros. Cotton Company.

"That the said R. G. Anderson wholly failed to pay over the said \$5,000 or any portion thereof to the state board of penitentiary and reform school commissioners; or to the state treasurer, but that the said Anderson appropriated said money to his own use; that the said state board of penitentiary and reform school commissioners and the state of Arkansas have wholly failed to receive any portion of said money.

"That the said indorsement of said check by the said Anderson was a forgery; that the said Anderson, as clerk of the said board, was not empowered or authorized by law to indorse said check nor to receive the money thereon, nor was the said Anderson authorized by the said board nor any member thereof to indorse said check nor to receive the money thereon; that by reason of the premises aforesaid, the plaintiff, the state of Arkansas, for the use of the Arkansas State Penitentiary, is entitled to recover from the said defendant, Bank of Commerce, the said sum of \$5,000, together with interest thereon at 6 per cent per annum from November 27, 1916."

A demurrer to this complaint was sustained, and, the state having elected to stand upon the complaint, the cause was dismissed, and this appeal has been prosecuted.

Counsel for the state concede that the point in issue was decided by this court in the case of Sims v. American National Bank of Ft. Smith, 98 Ark. 1, 135 S. W. 356. It is argued, however, that the opinion in that case, in so far as it appears to be decisive of the point at issue in this case, is dictum. The point decided in the Sims case was responsive to the following question asked in the opinion:

"Can the payee of a check or draft whose indorsement was forged, after payment by the bank upon which it was drawn upon such forged indorsement, maintain an action against the drawee to recover the amount of it?"

The court treated the question as stating the point there in issue, and made its answer to that question decisive of the facts of that case. Therefore the answer to this question cannot be treated as dictum. The court recognized the question as one of first impression in this court, and after a review of the authorities, as is indicated both by the opinion itself and the abstract of the briefs filed in that case, took a position based upon the decision of the Supreme Court of the United States in the case of First Nat-

ional Bank v. Whitman, 94 U. S. 343, 24 L. Ed. 230. The case cited and relied upon presents the exact question which we have here, and this court quoted with approval the following language from the case:

"We think it is clear, both upon principle and authority, that the payee of a check, unaccepted, cannot maintain an action upon it against the bank on which it is drawn."

The doctrine of the Sims case, *supra*, was reaffirmed by this court in the case of Rogers Commission Co. v. Farmers' Bank of Leslie, 100 Ark. 537, 140 S. W. 992, where it was said:

"That the giving of a check upon a bank is not an assignment of the amount of it to the payee, upon which he can bring a suit against the bank for its payment there being no privity between the drawee bank and the holder of the check until acceptance by it."

The point there decided, under the facts of that case, cannot be said to be dictum.

The opinion of this court in the Sims case is vigorously assailed by learned counsel for the state upon the ground that this doctrine as applied to the facts of that case is dictum, and it is also assailed upon the ground that it is contrary to the weight of authority and is against the sounder reason.

In reply to this argument it may be said that the point at least has been decided by this court as the doctrine of the Sims case, *supra*, was reaffirmed in the Rogers Commission Co. case, *supra*, and for the reason stated the language quoted was not dictum. Learned counsel are mistaken in the statement that these decisions are contrary to the weight of the authority upon this subject. The contrary appears to be the case, as is shown by the exhaustive note on the subject which is appended to the case of Ballard v. Home National Bank, 91 Kan. 91, 136 Pac. 935, L. R. A. 1916C, 161. The author of this note sets out the reported cases upon this subject, and states the majority rule to be that announced by the Supreme Court of the United States in the case of Bank v. Whitman, *supra*. The opinions of this court in the cases mentioned, in 98th and 100th Arkansas Reports, are cited along with the others as comprising the majority rule. According to this note, there can be no question that the rule as approved by this court in the case cited accords with the majority rule on the subject. This question was thoroughly considered by this court in the Sims case, *supra*, and this court took its position after a review of the leading authorities upon the subject. We do not there-

fore feel at liberty to overrule our cases simply because it might appear (which we do not decide) that the minority rule is based upon the sounder reason.

This court gave in the Sims case, *supra*, the following reason for the position which it then took:

"In such matters it is important that uniformity should obtain in the different jurisdictions, and that but one rule should be applied to the business dealings of the citizens of the different states with each other, so closely interwoven is such business activity and association with the vast commercial life of the nation and since the United States Supreme Court is the highest court of last resort, and does not follow the decisions of the state courts upon general banking and commercial questions, we will follow it."

Judgment affirmed.

Note.—Giving of Check as an Assignment of Funds in Hands of Drawee.—What is called the majority rule in this country is to the effect that there being no privity between payee of a check and drawee, its issuance does not operate as an assignment. This view has been sustained by at least twenty-one states and also by federal supreme court, and, and this independently of the Negotiable Instruments Law. But the rule of no assignment is but a principle and special circumstances may give to the issuance of a check the character of a *pro tanto* assignment and thus vest the holder with a right of action against a bank upon which it is drawn. *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. 439.

The Negotiable Instruments Law specifically provides that a bank shall not be liable to the holder of an unaccepted check, and this though it be true that the bank has agreed to apply funds subject to these purposes.

What has been called the minority rule has been ruled by at least nine states, *viz.*: (1860) *Munn v. Burch*, 25 Ill. 35 (often approved in subsequent rulings); *Bloom v. Winthrop State Bank* (1903), 121 Iowa 101, 96 N. W. 733; (1871) *Lester v. Given*, 8 Bush. (Ky.), 357 (often approved later); *Gordon v. Maschler* (1882), 34 La. Ann. 604; *Taylor v. First Nat. Bank* (1912), 119 Minn. 525, 138 N. W. 783, *Ann. Cas.* 1914 A, 1302; *Fonner v. Smith* (1891), 31 Neb. 107, 47 N. W. 632, 11 L. R. A. 528, 28 Am. St. Rep. 510; *Ballen v. Bank of Kremlin*, 1913, 37 Okla. 112, 130 Pac. 539, 44 L. R. A. (N. S.) 621, (minority rule recognized but not applied under the circumstances); *Southern Seating Cabinet Co. v. First Nat. Bank* (1910), 87 S. C. 79, 68 S. E. 962, 29 L. R. A. (N. S.) 623, and *Turner v. Hot Springs Nat. Bk.*, 18 S. D. 498, 101 N. W. 348, 112 Am. St. Rep. 804, 5 Ann. Cas. 937.

All of these cases were decided prior to the adoption of Negotiable Instruments Act, and in some of these states it was held that this act changed former ruling, as see *Rauch v. Bankers' Nat. Bank*, 143 Ill. App. 625; *Home v. Stanhope Bank* (1908), 138 Iowa 39, 115 N. W. 476; but the

act was held not to apply to a suit in equity; *Guenther v. Bank of Monroe*, 1911, 90 Neb. 280, 133 N. W. 402.

Where a check has been certified or accepted this has been held quite generally to put the matter on a wholly different basis, certification, indeed, supplying all the necessary privity between the holder and the bank. Even though drawer never had funds in drawee bank, and the certification was fraudulent and illegal by a bank's official, holder in good faith was protected. *Pope v. Bank of Albion*, 59 Barb. (N. Y.) 592. But this case was reversed in Court of Appeals, on ground that subordinate official had no authority to certify checks. *S. C. v. S. C.*, 57 N. Y. 126.

It would seem unnecessary to set forth the reasoning of the opposing courts on the question of privity *rel non*, because of the purpose of Uniform Negotiable Instruments Act aiming at uniformity in ruling in different states, the existence of which purpose appearing to us a better basis to go upon than is stated in *Sims v. American Natl. Bank*, 98 Ark. 1, 135 S. W. 536, this reasoning being set forth in the instant case. It may, therefore, be deemed greatly academic to set forth the minority view, as antedating the Negotiable Instruments Act, for whether that view was right or wrong, now our attention ought to be focussed on the interpretation given to that act. C.

ITEMS OF PROFESSIONAL INTEREST.

PROGRAM FOR THE MEETING OF THE TEXAS BAR ASSOCIATION.

The Texas Bar Association will hold its thirty-seventh annual meeting at Wichita Falls, July 3rd, 4th and 5th, 1918.

The address of welcome will be made by Hon. A. H. Britain, of Wichita Falls, and the response by Hon. J. H. Barwise, Jr., of Fort Worth.

The principal addresses will be as follows: "The History and Purposes of the American Bar Association," by Hon. Hiram Glass, of Austin; "Judicial Organization," by Dr. Roscoe Pound, of Harvard University; and "Uniform State Laws," by Hon. W. O. Hart, of New Orleans.

PROGRAM FOR THE MEETING OF THE NEW HAMPSHIRE BAR ASSOCIATION.

The annual meeting of the New Hampshire Bar Association will be held at the Crawford House, White Mountains, July 6, 1918.

The principal address on the program is that of the President of the Association, Hon.

Geo. F. Morris, of Lancaster. The annual address will be by Judge George M. Powers, of the Vermont Supreme Court. Hon. Walter George Smith, of Philadelphia, will give an address on "Uniform State Laws."

The Secretary of the Association, Mr. Arthur H. Chase, writes that they are expecting a record breaker in attendance as well as in other things.

PROGRAM OF THE MEETING OF THE IOWA BAR ASSOCIATION.

The Iowa State Bar Association will hold its Twenty-fourth Annual meeting at Des Moines, June 27 and 28, 1918.

Hon. Chas. W. Mullan, of Waterloo, will deliver the president's address, and his subject will be "Allegiance to the Constitution." Papers will be read on the following subjects: "The American Bar Association," by Mr. Thomas J. Bray, of Oskaloosa, Ia.; "Civil and Military Courts," by Capt. Percy Bordwell, of Camp Dodge; the annual address will be made by Hon. Rome G. Brown of Minneapolis, whose subject will be "The Disloyalty of Socialism." Gov. Wm. L. Harding, of Sioux City, will also address the convention.

PROGRAM FOR THE MEETING OF THE INDIANA BAR ASSOCIATION.

The Indiana Bar Association will meet at Indianapolis, July 10, 1918.

The president's address will be delivered by Mr. Inman H. Fowler, of Spencer, who will take as his subject, "What Shall be Done With the Mob?" The annual address will be delivered by Hon. Lindley M. Garrison, whose subject will be "After the War—What?"

Papers will be read by Mr. Chas. Martindale, on "Americanism and War;" and by Mr. Lex J. Kirkpatrick, on "The Movement for Uniform State Legislation." A discussion of the latter paper will be conducted by Prof. Ernest Freund of Chicago University.

A CORRECTION.

We call the attention of our readers to two errors in the printing of the article by Hon. Walter George Smith, in the Central Law Journal for May 24, 1918. On page 373, the name of Justice Riddell should be William Renwick Riddell. On page 376, the quotation from

Karl Liebnecht should be the paragraph beginning "The German government," etc., and the one following it; the paragraph which is a quotation from The Federalist, on the same page, should appear on page 374, following the paragraph beginning "If there should happen to be," etc. We regret the mistake, which, however, was not made by us but by those who set up the printed copy of Mr. Smith's address, which we used in reprinting the address.—Editor.

CORRESPONDENCE

PROGRAM OF THE MICHIGAN BAR ASSOCIATION MEETING.

Editor, Central Law Journal:

Your letter of May 21st addressed to Harry A. Silsbee, Secretary of the Michigan State Bar Association, has been referred to me for reply, inasmuch as I have principal charge of arrangement of the program. While the program is not fully completed at this time, it embraces an address by Hon. Samuel Rosenbaum, of Philadelphia, upon the subject, "Commercial Arbitration"; also a paper by Prof. Edson R. Sunderland, of the University of Michigan, upon the subject, "A New Function for Courts—Declaring the Rights of Parties". The subject of Uniform State Laws will be reviewed by Hon. Geo. W. Bates, of Detroit, a member of the Michigan Commission on Uniform State Laws. The work of the Legal Advisory Boards, past and future, will be discussed by Major A. E. Peterman, Judge Advocate, of Lansing. Addresses by one or more members of the Supreme Court and by the Governor of the State have been promised.

At a meeting of the association held last year in Grand Rapids, Prof. John R. Rood of the University of Michigan, presented a paper upon the subject, "The Cost of Public Justice". This paper has occasioned considerable comment throughout the country and will form one of the subjects for open discussion at the coming meeting. This is to be the 28th annual meeting of this association and will be held in Kalamazoo, Michigan, June 28th-29th, 1918.

BATTLE CREEK, Mich.

Yours very truly,
BURRITT HAMILTON,
President.

PRESUMING FOREIGN STATUTE MAKES
SAME EXCEPTIONS AS STATUTE
OF FORUM.

June 4, 1918.

Editor, Central Law Journal:

Dear Sir: I have just read the case of Lillard v. Lierly, 202 S. W. 1057. It seems to me that the court has gone so far wrong that attention should be called to it. They hold correctly that if the statute of Nebraska is not pleaded they cannot notice it and that in the absence of a showing as to the law of Nebraska the law of Missouri is to govern, presumed to be the same, I think they are right in both holdings but in the case at bar the Nebraska Law of Limitations is pleaded and proven. Judicially, the whole Limitation statute is pleaded, and none other is known. While the briefs and argument of counsel show that the Nebraska statute had a saving clause. Judicially, there was no other limitation law except the statute pleaded. How can the court tack on to the Nebraska law of limitation our saving clause by presumption?

To illustrate, suppose that the statute pleaded was *all* of the Nebraska law of limitations (and none other being pleaded, it is all), can the Missouri Court, by presumption add to it, by presuming a saving clause. This is the result of their conclusions. There are states that have limitation laws but no saving clauses. Now, if one should sue on note from one of those states and defendant should plead the Statute of that state, will our court read into the law of that state a saving clause, that was never enacted and thereby enlarge and modify the Statute of that State. My judgment may be bad but it does seem to me that the case is wholly wrong and will set a bad precedent to annoy litigants and the courts. What do you think of it.

Truly yours,
W. D. SUMMERS.

Harrisonville, Mo.

[See note on this case, in this issue, page 426.
—Editor.]

BOOKS RECEIVED.

The Progress of the Continental Law in the Nineteenth Century. By various authors. Boston. Little, Brown & Company. 1918. Price, \$5.00. Review will follow.

HUMOR OF THE LAW.

Was it at a meeting of our aircraft officials? Perhaps it was and perhaps it wasn't. Any-way, a member was protesting vigorously against the snail-like progress in turning out things that were sorely needed. A "scene" ensued and the chairman tried to pour oil on the troubled waters.

"Mr. Blank must remember," said he, "that Rome wasn't built in a day."

"I know it wasn't," retorted the protesting member, "and if this board had had the work to do it wouldn't be built yet."

Two elderly gentlemen, both decently clothed in sober black, were sitting side by side in a motor bus. Each was reading a morning paper. Suddenly one of the men uttered an exclamation of pleasure and the other peered at him over his spectacles.

"I see here," explained the first, with a beaming face, "that Mr. Grewson, who died last week, has left his entire fortune to various charitable enterprises. This will be a surprise to his many relatives. It is to me—a glad surprise, in my case, for I am the minister of a church to which he has left \$2,000."

The other man looked at the newspaper and his face, too, became wreathed in smiles.

"Bless him!" he exclaimed heartily. "All to charitable institutions, in spite of his relatives! Ah, sir, I like to see money left like that—I do, indeed!"

"Are you also a minister?"
"No, sir; I am a lawyer."

"Now, sir," cried Mr. Bagwig ferociously, "attend to me! Were you not in difficulties a few months ago?"

"No."

"Now, sir! Attend to my question. I ask you again, and pray be careful in answering, for you are on your oath, I need hardly remind you. Were you not in difficulties some months ago?"

"No; not that I know of."

"Sir, do you pretend to tell this court that you did not make a composition with your creditors a few months ago?"

A bright smile of intelligence spread over the ingenuous face of the witness, as he answered:

"Oh! Ah! That's what you mean, is it? But, you see, it was my creditors who were in difficulties, and not me."

WEEKLY DIGEST

**Weekly Digest of ALL the Important Opinions
of ALL the State and Territorial Courts of
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1. Adoption—Evidence.—A decree of adoption, based on a finding that father had neglected to support child for upwards of one year in a proceeding before proper tribunal, from which no appeal was taken, is presumed to be based on evidence, and will not be set aside for lack of jurisdiction.—*In re Young, Pa.*, 103 Atl. 844.

2. Bankruptcy—Adjudication.—Adjudication in bankruptcy is caveat or notice to all world, and creditors, if desiring to question adjudication, on ground that it was induced by fraud, must act promptly, or their rights are lost, for passage of bankrupt's estate to trustee will prevent return to status quo.—*In re Greer, U. S. D. C.*, 248 Fed. 131.

3.—Equity.—Equitable rights of claimants as creditors of another corporation whose property bankrupt acquired, on theory that it was transferred subject to a trust ex maleficio, cannot be treated as a valid lien superior to rights of general creditors of bankrupt until, by some legal proceeding, it has become attached to the property of the bankrupt.—*In re American Candy Mfg. Co., U. S. D. C.*, 248 Fed. 145.

4.—Equity.—Claimant's equitable lien to follow assets of transferror corporation into the hands of bankrupt, depending as it did on legal proceedings had within four months of bankruptcy and in part coming after attachment of

all of bankrupt's property had within four-month period, was under Bankruptcy Act, § 67f, discharged by adjudication in bankruptcy.—*In re American Candy Mfg. Co., U. S. D. C.*, 248 Fed. 145.

5.—Insolvency.—Where indorser or surety on note of bankrupt, within four months of bankruptcy, knowing of bankrupt's insolvency, induces him to pay note with intent of escaping liability, such surety or indorser received preference, which may be recovered by trustee in bankruptcy.—*Chapman v. Hunt, U. S. D. C.*, 248 Fed. 160.

6.—Mortgage.—While mortgage itself does not entitle mortgagee to collect rents, mortgagee in case of deficiency is entitled to rents collected between adjudication of mortgagor as bankrupt and sale under foreclosure proceedings, for Bankruptcy Act deprives the mortgagee of his right to reach such rents.—*Birdsell v. Liberty Trust Co., U. S. C. C. A.*, 248 Fed. 112.

7.—Preference.—Though it may have that effect incidentally, transfer by insolvent debtor cannot be set aside under Bankr. Act, § 67e, as one tending to hinder, delay, and defraud creditors, unless it was made with intention of unlawfully hindering, delaying, and defrauding creditors.—*In re Braus, U. S. C. C. A.*, 248 Fed. 55.

8. Banks and Banking—Director of Corporation.—A director in a financial institution must exercise the same degree of care that men prompted by self-interest generally exercise in their own affairs, to know how the business is conducted, and to give direction to its affairs, and is not excused by the fact that he is a mere honorary director, and is not expected to give the business any attention.—*Kavanaugh v. Gould, N. Y.*, 119 N. E. 237, 223 N. Y. 103.

9.—Stockholder's Liability.—A loan to a liquidation agent of a national banking association cannot make stockholders individually liable, under Rev. St. § 5220 (Comp. St. 1916, § 9806), and section 5151.—*American Nat. Bank of Macon v. Commercial Nat. Bank of Macon, U. S. D. C.*, 248 Fed. 187.

10.—Usury.—State statutes prescribing penalties for usury have no application to negotiable instruments held by national banks; the penalty fixed by Rev. St. U. S. § 5198 (U. S. Comp. St. 1916, § 9759), against such banks for usury, and remedy given by act of Congress against such banks for taking usury, being exclusive.—*Young v. First Nat. Bank, Ga.*, 95 S. E. 381.

11. Bills and Notes—Consideration.—A note given to a bank to procure its surrender of a note of a third person is a binding obligation, though the maker of the note did not obtain the consideration therefor.—*United States Fidelity & Guaranty Co. v. Walker, U. S. C. C. A.*, 248 Fed. 42.

12.—Innocent Purchaser.—Transferees of negotiable note by payee's indorsement guaranteeing payment at maturity or thereafter with interest is an indorsee within rule protecting innocent purchaser in due course for value before maturity against defenses good between original parties.—*First Nat. Bank of Dalton, Ohio, v. Cummings, Okla.*, 171 Pac. 862.

13. **Brokers**—Evidence.—Where by terms of written agreement plaintiff was to receive a commission only if a lease was made with W. satisfactory to B., plaintiff could not recover where no lease was made, and W. was not willing to accept a lease on terms satisfactory to B.—*Fleming v. James S. Holden Co.*, Mich., 166 N. W. 1042.

14. **Carriers of Live Stock**—Unloading.—Where it was carrier's duty to unload animal, and where, if it had done so, it could have seen, or ought to have seen, apparent injury, it could not complain of its lost opportunity to see injury, if any.—*Ferebee v. Atlantic Coast Line R. Co.*, S. C., 95 S. E. 349.

15. **Carriers of Passengers**—Baggage.—Evidence that a passenger arriving in the station left his baggage with the baggage master, who agreed that he might leave it for two or three days, and that the baggage was never delivered to him, warrants a finding of negligent failure to exercise due care.—*Jonesboro, L. C. & E. R. Co. v. Dapenport*, Ark., 201 S. W. 1114.

16.—**Invitee**.—While persons on platform to accompany friends to trains are invitees, one going from curiosity to see shipment of a corpse is a licensee.—*St. Louis & S. F. R. Co. v. Stacy*, Okla., 171 Pac. 870.

17. **Commerce**—Employee.—A locomotive fireman, who on Sunday when off duty went to railroad yards to transfer his tools to engine used in interstate commerce, and was killed by locomotive in yards, was not then engaged in interstate commerce, and his administratrix could not sue under federal Employers' Liability Act.—*Hansen v. New York Cent. & H. R. R. Co.*, N. J., 103 Atl. 200.

18.—**Interstate Cars**.—A railroad company in breaking up interstate trains at a junction point within the state to facilitate delivery of shipments to other points within the state is engaged in interstate commerce notwithstanding interstate cars were to be delivered within state or at terminal where trains were broken up.—*Southern Pac. Co. v. Stephens*, Tex., 201 S. W. 1076.

19. **Compromise and Settlement**—Conclusiveness of.—Where elaborate contract adjusting difficulties between parties was result of much consideration and many consultations with counsel, it is not thereafter subject to attack on ground that it was not deliberately entered into.—*Graham v. J. D. Spreckels & Bros. Co.*, U. S. C. A., 248 Fed. 66.

20. **Constitutional Law**—Executive Departments.—Congress may make decisions of executive departments or subordinate officials thereof, to whom it has committed the execution of certain acts, final on questions of fact; and decisions of those officials cannot be reviewed, unless contrary to law or a fair hearing has been denied.—*United States v. Kinkead*, U. S. D. C., 248 Fed. 141.

21.—**Telephone Company**.—Contracts between telephone companies, if valid, do not prevent the state from exercising its power to provide for the welfare of the people, even though such provision may render such contracts partially or wholly ineffective.—*Northern Indiana & Southern Michigan Telephone, Telegraph & Cable Co. v. People's Mut. Telephone Co. of La Grange*, Ind., 119 N. E. 212.

22. **Contracts**—Husband and Wife.—Where plaintiff painted defendant's house, understanding that her husband was to pay for it, defendant

understanding she was to pay, plaintiff can recover from the wife.—*Lapham v. Collins*, N. H., 103 Atl. 306.

23.—**Mutuality**.—Where buyer promises to purchase certain amount of corporate stock at certain price per share, and seller furnishes such amount under agreement, contract is not invalid for lack of mutuality, on ground that at time of making offer seller did not bind himself to furnish said amount of stock.—*International Life Ins. Co. v. Stuart*, Tex., 201 S. W. 1088.

24. **Corporations**—Bill of Sale.—Phrase "all assets of corporation," as used in bill of sale by corporation to intervener president and director, held to include all assets, so that sale was void where not made with consent of two-thirds of stockholders, as required by Civ. Code, § 361a.—*Porter v. Anglo & London Paris Nat. Bank of San Francisco*, Cal., 171 Pac. 845.

25.—**Ratification**.—Determination of mining company's directors that, in event mine became productive, they might take care of notes given lenders to company by former president, unauthorized to borrow, was not ratification.—*Massie v. Eldorado Gold Star Mining Co.*, Cal., 171 Pac. 814.

26.—**Stockholders**.—Directors of corporation must give stockholders notice of any issue of stock, and an opportunity to subscribe therefor, and if they fail to give such notice and purchase stock themselves to gain control of corporation, the issue may be set aside at instance of stockholder.—*Glenn v. Kittanning Brewing Co.*, Pa., 103 Atl. 340.

27. **Covenants**—Injunction.—Covenants in deeds to number of lots abutting on residential street that no building of any kind should be placed within 40 feet of the street was breached by lowering of grade and construction of street railway loop, and such improvement would be enjoined.—*Dewan v. Carson*, Pa., 103 Atl. 343.

28.—**Restrictions**.—Evidence that lot owner in an allotment notified intending purchaser that use of lots was restricted to single residence purposes did not charge purchaser with notice that such restrictions were for benefit of owners of the lots.—*Adams v. Donovan*, Ohio, 119 N. E. 252.

29. **Damages**—Measure of.—Where the grass on plaintiff's land was fired by railroad company, plaintiff is entitled to recover as damages the highest market value for any purpose to which he might wish to subject the land or the grass, including the purpose of pasturage.—*Ft. Worth & D. C. Ry. Co. v. Hapgood*, Tex., 201 S. W. 1040.

30.—**Measure of**.—In an action for damages to mule from defendant's automobile, the value of its feed and attention during recovery was allowable in connection with a recovery for the partial depreciation in its market value.—*Cook v. Daniel*, Ga., 95 S. E. 376.

31. **Deeds**—Consideration.—On conveyance of realty to son under agreement to provide for grantors for life, provision that he pay certain sums to other children, and making such payments liens on realty, was not based on valuable consideration; and where contract was rescinded and property reconveyed, there was no obligation to make payments.—*Emkee v. Ahston*, Minn., 166 N. W. 1079.

32.—**Equity**.—Equity will set aside a deed from a vendor to his attorney, in whom he imposed implicit confidence, where the vendor was of feeble mind and the consideration was grossly inadequate, though the relation of attorney and client had ceased when the deed was executed.—*Miller v. Thompson*, Okla., 171 Pac. 850.

33. **Easements**—Appurtenant.—Where owner of unimproved tract divided it so as to give access to all except one from public highway by means of private road and left some without any access, and granted parts to different persons, each grantee took subject to the use of road by others as an easement appurtenant to extent reasonably necessary for use.—*Sharp v. Kline*, W. Va., 95 S. E. 441.

34.—**Injunction**.—In suit to enjoin defendants from crossing plaintiff's farm, plaintiff was

properly permitted to show that one who lived on farm cultivated claimed right of way, interference with defendants' enjoyment of right of way by one in possession under owner having same effect as an interruption of adverse possession as the same act by owner himself.—*Waterman v. Moody*, Vt., 103 Atl. 325.

35.—**Prescription.**—An easement to maintain a sewer pipe over the land of another cannot arise by prescription, where the use of the land for such purpose did not exist prior to the severance of the unity of ownership, and no necessity for such easement has ever existed.—*Heyman v. Biggs*, N. Y., 119 N. E. 243.

36. **Eminent Domain—Trespass.**—Where railway company by increasing its consumption of water taken from plaintiff's water supply injured him, and upon being sued, commenced proceedings to exercise its right of eminent domain, it was none the less a trespasser as against plaintiff.—*Norfolk & W. Ry. Co. v. A. C. Allen & Sons*, Va., 95 S. E. 406.

37. **Equity—Lien.**—Where complainant's bill to enforce mechanic's lien alleged that named persons had some interest in premises either as mortgagees or purchasers, but alleged that mortgage was inferior to lien, and evidence indicated that existence of mortgage was uncontested, complainant cannot attack decree because of absence of formal proof of mortgage; his pleading amounting to admission of its existence.—*Turner Const. Co. v. Union Terminal Co.*, U. S. C. C. A., 248 Fed. 120.

38. **Estates—Dower.**—Where owner of land subject to dower and to a mortgage to secure payment of dower interest acquired such interest, and thereafter conveyed subject to the mortgage, the dower and the fee merged, and grantors' personal representative could not maintain assumpstis for dower against the grantee.—*Griffith v. McKeever*, Pa., 103 Atl. 385.

39. **Estoppel—Shipper of Animal.**—Shipper of animal was not estopped, by signing receipt, from showing that animal was severely injured, and not, as he first thought, only slightly injured, as he had reasonable time after he received animal to ascertain extent of injury.—*Ferebee v. Atlantic Coast Line R. Co.*, S. C., 95 S. E. 349.

40. **Fraud—Negligence.**—Where one party to exchange relied entirely on the other's representations, and was defrauded, he was under no legal obligation to investigate, and the other could not defeat recovery on ground of negligence.—*Laird v. Keithley*, Mo., 201 S. W. 1138.

41. **Frauds, Statute of—Debt of Another.**—Verbal promise of defendant stockholders that they would be responsible for rent on premises leased by corporation until another tenant was procured was collateral, and plaintiff lessor, who did not release corporation or waive any of her rights, could not recover on such promise, in view of Code, § 2840, as to promises to answer for debt of another.—*Friedlin v. Crocklin*, Va., 95 S. E. 432.

42. **Fraudulent Conveyance—Consideration.**—Where deed recited consideration of love and affection and for better support and maintenance, as well as \$1 and other valuable considerations, and plaintiff made no attempt to controvert recital, it cannot be held that transfer was without valuable consideration, in view of Civ. Code, § 1615.—*Franck v. Moran*, Cal., 171 Pac. 841.

43.—**Mortgage.**—To prevent a transaction, on its face a mortgage, being declared void as a preferential assignment, it is immaterial that the conveyance was made immediately to the trustees instead of directly to beneficiary, since the statute does not prescribe the form of a mortgage.—*Mills v. Sumter Lumber Co.*, S. C., 95 S. E. 355.

44. **Guaranty—Assumption of Debt.**—Purchaser of all of a company's stock, agreeing to assume all "current liabilities," was liable for monthly payments of rent under a lease existing at time of guaranty (citing 2 Words and Phrases, 1790).—*Shaffer v. George*, Colo., 171 Pac. 881.

45.—**Insurance.**—"Incontestable," as used in life insurance policies making them incontest-

able means indisputable, and amounts to a guarantee that no objection shall be taken to defeat the policy on the death of the insured.—*Stearns v. Occidental Life Ins. Co.*, N. M., 171 Pac. 786.

46.—**Extension.**—Where, in consideration of written guaranty of note of guarantors' deceased brother, noteholder extended note and waived lien on horses under mortgage securing note, which horses guarantor's son was to use in hauling to secure funds to pay note, consideration for guaranty did not fail because deceased brother's administrator took possession of horses.—*McDaniel v. Cage & Crow*, Tex., 201 S. W. 1078.

47. **Homestead—Abandonment.**—Abandoned wife, without minor children or single daughters living with her, or other constituent members of family, may mortgage her homestead.—*Williams v. Farmers' Nat. Bank of Stephenville*, Tex., 201 S. W. 1083.

48.—**Mutual Wills.**—Where husband and wife mutually willed homestead to survivor for life, with remainder to their children, and after death of surviving wife, it was not occupied by children, they took free from homestead character, and it might be subject to former judgment against husband revived against his administratrix.—*Poole v. Edson*, Kan., 171 Pac. 769.

49. **Insane Persons—Notice.**—Where one was arrested on charge of insanity by order of a probate court, and brought before the court, tried, and found insane, such arrest and bringing before the court was the equivalent of the notice required by Rev. St. 1909, § 476.—*State ex rel. Pollard v. Brasher*, Mo., 201 S. W. 1150.

50. **Insurance—Accident.**—In action on accident policy defended on ground of suicide, evidence that pistol which inflicted fatal wound could be discharged by a fall was admissible; discharge being admitted.—*Reynolds v. Maryland Casualty Co.*, Mo., 201 S. W. 1128.

51.—**Burglary.**—Damage to garments by moths after being taken from their packages by persons who broke and entered was only consequentially due to the burglary, so that owner could not recover under a policy insuring against "direct" loss by burglary, theft, or larceny.—*Downs v. New Jersey Fidelity & Plate Glass Ins. Co. of Newark*, N. J., 103 Atl. 205.

52.—**Collateral Security.**—Where seller of property effects insurance under contract, such is collateral security for debt, and seller must give credit to buyer for any amount collected theron, and when exceeding debt pay residue to buyer whether the insurance be of property or only seller's insurable interest.—*Camp & Meehl v. Christo Mfg. Co.*, Va., 95 S. E. 424.

53.—**Executory Contract.**—Purchaser occupying land under executory contract, though purchase price is not fully paid, is the unconditional and sole owner of fee-simple title thereto within fire insurance policy by its terms void, unless insured has unconditional and sole ownership.—*Globe & Rutgers Fire Ins. Co. v. Creekmore*, Okla., 171 Pac. 874.

54.—**Iron-Safe Clause.**—Under iron-safe clause requiring insured to take inventory within 30 days and to keep set of books showing the stock on hand and avoiding policy if he did not do so, where fire occurred less than 30 days after issuance of the policy, the insured could recover regardless of books or inventory.—*Springfield Fire & Marine Ins. Co. of Springfield, Mass. v. Shapoff*, Ky., 201 S. W. 1116.

55.—**Suicide.**—An incontestable clause in a policy of insurance does not preclude the defense of suicide, where the suicide clause is a part of the contract to pay, providing how much shall be due and payable in the event of suicide.—*Stearns v. Occidental Life Ins. Co.*, N. M., 171 Pac. 786.

56. **Intoxicating Liquors—Taxation.**—Under Laws 1917, c. 623, providing for reduction of liquor tax certificates according to population, where entire town should have been allowed 126 certificates instead of 125, excise commissioner had authority to designate additional place, but no authority to nullify designation already made.—*In re Gaignat*, N. Y., 119 N. E. 236.

57. **Joint Adventures—Termination.**—Where a continuing contract to jointly acquire land

existed, and several attempts to acquire the land had failed, failure of one to perform by paying his share of money under a contract with the owners did not terminate the joint adventure, in the absence of a prior agreement to such effect.—*McDonough v. Saunders*, Ala., 78 So. 160.

58. **Judgment—Counterclaim.**—Matter available as a complete defense to an action at law for damages for breach of written agreement for exchange of property was not such counterclaim as might be reserved for future suit in equity to cancel agreement.—*Rothman v. Engel*, Ohio, 119 N. E. 250.

59. **Landlord and Tenant—Negligence.**—Although lessee, who had leased three rooms on second floor, and his family, including plaintiff, a child six years old, were entitled, in common with other tenants, to use of room in which was skylight, guarded by railing about 32 inches high, plaintiff could not recover because while at play in said room he climbed or fell through opening between planks of railing or from top thereof through skylight to floor beneath.—*Berlin v. Wall*, Va., 95 S. E. 394.

60.—**Terms of Years.**—Where defendant went into possession of premises under plaintiff, who had lease, and meantime plaintiff obtained from his lessor, who had estate for years, second lease, to begin at expiration of old one, defendant cannot, in summary proceedings justify his retention of premises under assignment executed by one to whom plaintiff's lessor had assigned personal property on premises; it not appearing that such person had obtained title to term of years.—*Sayles v. Murphy*, Mich., 166 N. W. 989.

61. **Libel and Slander—Libel Per Se.**—The words "debasing act," as used in Civil Code 1910, § 4433, making it slander to charge another with having some contagious disorder, or of being guilty of some "debasing act which may exclude him from society," have reference to those repulsive acts which would cause him to be shunned or avoided, in the same way as would a contagious disease.—*Morris v. Evans*, Ga., 95 S. E. 385.

62.—**Special Damage.**—The false statement by defendant that plaintiff was a negro is actionable per se under the statute, and no averment or proof of special damage is necessary, and plaintiff may recover upon proof of general loss of business.—*Mopsikov v. Cook*, Va., 95 S. E. 426.

63. **Licenses—Taxation.**—Legislature has power to impose license tax on practice of his profession by civil engineer, upon his acting as civil engineer, in the business of another as well as in his own business.—*Derrick v. Commonwealth*, Va., 95 S. E. 392.

64. **Lien—Priority.**—Where contract by which a sawmill company sold lumber to defendant and received advancements of money did not provide for a lien in favor of defendant, defendant had no lien by operation of law superior to liens of labor claimants.—*Tallahatchie Lumber Co. v. Thatch*, Miss., 78 So. 154.

65. **Master and Servant—Casual Employee.**—One who kept machinery and boats in order in an amusement park whenever called upon, and had no other occupation, was not a "casual employee," so as to be excluded in determining the number of employees necessary to bring employer within Workmen's Compensation Act.—*Boyle v. Mahoney & Tierney*, Conn., 103 Atl. 127.

66.—**Contributory Negligence.**—Where mining company was trying to relieve an old passageway, which had been flooded with water but which was not imminently dangerous so as to require the closing down of the mine, a miner's use of the new passage would not be contributory negligence.—*Cossette v. Faulton Coal Mining Co.*, Pa., 103 Atl. 346.

67.—**Course of Employment.**—Where a woman employed as chambermaid in rooming hotel, when the janitor was sick, and without her employer's knowledge, went into a light well to clean it, fell, and was killed, her kin were entitled to no compensation, since she acted beyond the scope of her employment.—*Williamson v. Industrial Accident Commission*, Cal., 171 Pac. 797.

68.—**Independent Contractor.**—Musicians, although furnished by the leader twice each week to play in an amusement park, who stipulated the amount of compensation they were to receive, were not employees of an independent contractor, within Workmen's Compensation Act.—*Boyle v. Mahoney & Tierney*, Conn., 103 Atl. 127.

69.—**Respondeat Superior.**—Where one employed to follow master's trucks and oversee receipt and delivery of goods, permitted to select means of travel, but not a licensed chauffeur and not authorized to drive a car, took one from another servant and drove it, injuring a third person, the master is not liable.—*O'Laughlin v. Mackey*, N. Y., 169 N. Y. S. 835.

70.—**Workmen's Compensation Act.**—Where a paper mill was a going concern, and installation therein of new engine was necessary to run it at its full capacity, an employe engaged in installing engine was furthering business of mill within Workmen's Compensation Law, § 2, group 15, making manufacturing of paper a hazardous employment.—*McNally v. Diamond Mills Paper Co.*, N. Y., 119 N. E. 242.

71.—**Workmen's Compensation Act.**—Where skyarking of boy employes came under observation of employer's president and superintendent, they were thereby charged with contemplating no more than a recurrence, and not that one boy might commit an atrocious assault on the other.—*Mountain Ice Co. v. McNeil*, N. J., 103 Atl. 184.

72.—**Workmen's Compensation Act.**—Servant, working in room where there was movable elevator operated by hand, and adjacent to stamping room containing power-driven press, elevators, and stamping machine, was employed in proximity of hoisting apparatus and power-driven machinery under Workmen's Compensation Law (Laws 1911, c. 163) § 1.—*Morin v. Nashua Mfg. Co.*, N. H., 103 Atl. 312.

73. **Mines and Minerals—Cancellation.**—Under Rev. St. §§ 2347-2351 (Comp. St. 1916, §§ 4659-4663), entries cannot lawfully be made in interest of persons or associations who have exercised their own right of entry, and patents based on entries by persons who had not exercised their pre-emption rights pursuant to scheme to enable person or association to obtain lands in excess of amount allowed are fraudulent and subject to cancellation.—*United States v. Kirk*, U. S. C. C. A., 248 Fed. 30.

74. **Mortgages—Cutting Timber.**—Where first mortgage on timber lands and other property of a lumber company authorized the cutting and removal of timber on payment to the trustee of affixed sum per thousand feet, those accepting a third mortgage subject to the conditions of the first cannot complain of cutting and removal of timber pursuant to that provision.—*First Nat. Bank of San Francisco v. Detroit Trust Co.*, U. S. C. C. A., 248 Fed. 16.

75.—**Recitals.**—Where owners of land mortgaged it, and it was subsequently partitioned among them, and through various deeds various purchasers assumed mortgages, a subsequent mortgagee of one of the purchasers was not an innocent purchaser, since he was bound by the recitals of his title deeds which had been made prior to the time of the mortgage.—*Fry v. White*, Ark., 201 S. W. 1106.

76. **Municipal Corporations—Contributory Negligence.**—That wagon was driven at night without a lamp in violation of 4 Comp. St. 1910, p. 4470, § 92a, is only a circumstance to be considered on the question of contributory negligence, and does not prevent recovery, where the wagon was run down.—*Kopper v. Bernhardt*, N. J., 103 Atl. 186.

77. **Negligence—Attractive Lures.**—Where child was injured playing on turntable, action of tormerman, near by, in speaking generally to the children on turntable, telling them they might get hurt, did not relieve railroad company from liability.—*Gulf, C. & S. F. Ry. Co. v. Chappel*, Tex., 201 S. W. 1037.

78. **Parent and Child—Stepdaughter.**—As respects stepdaughter's right to money given or paid her by her stepfather for services rendered, and by her loaned to him, it is immaterial whether she had been emancipated by him, or whether, under circumstances, he was in loco

parentis to her and entitled to her services.—*Youngblood v. Hoeffle*, Mo., 201 S. W. 1057.

79. **Principal and Agent**—Evidence.—Agency may be inferred from the fact that circulars and letterheads of a party described a certain person as its agent.—*Theisen v. Detroit Taxicab & Transfer Co.*, Mich., 166 N. W. 901.

80. —Evidence.—Where defendant authorized plaintiffs for commission to rent and care for property, without time limit, and plaintiffs knew that the property would be sold, and did not object to giving option thereon, and defendant sold the property, plaintiffs could not recover commissions on rents not yet collected, nor damages for the breach.—*Casey v. Walker & Mosby*, Va., 95 S. E. 434.

81. **Principal and Surety**—Bond on Condition.—Where bond conditioned to pay for each lot of live stock within 48 hours after delivery was by agreement changed to provide for payment within two weeks after delivery, the change was not retroactive, and bonds did not secure money due from sales made during two weeks prior to the change.—*Hughes v. Globe Indemnity Co.*, Minn., 166 N. W. 1075.

82. **Railroads**—Interstate Train.—Fact, standing alone, that interstate mail train did not stop at county seat but stopped at smaller places on flag, is of slight weight in determining county seat's claim of discrimination in train service.—*State ex rel. Missouri Pac. Ry. Co. v. Public Service Commission of Missouri*, Mo., 201 S. W. 1143.

83. —Setting Out Fire.—In action for firing plaintiff's barns, testimony that witnesses building new barns at greater distance from railroad saw that live sparks were carried to new site is admissible to show that it was physically possible for sparks from engine to have caused fire.—*Budd v. Ann Arbor R. Co.*, Mich., 166 N. W. 927.

84. **Receivers**—Landlord and Tenant.—Where landlord, whose premises had been occupied while receivers of corporation continued business, asserted claim for damages, but there was no evidence as to what damage had occurred during receivership and what occurred while premises were in possession of corporation prior thereto, whole item must, as against receivers, be disallowed.—*Atkinson & Co. v. Aldrich-Clisbee Co.*, U. S. D. C., 248 Fed. 184.

85. **Sales**—Contract.—Where plaintiff stopped delivery, before termination of contract to deliver a certain amount of milk daily from a certain number of cows, because of sale of his cows, he could not recover in an action on contract for milk delivered.—*Karales v. Los Angeles Creamery Co.*, Cal., 171 Pac. 821.

86. —Damages.—In action for failure to deliver store fixtures for a business just commencing, it was error to allow damages for profits measured by profits made during corresponding period of ensuing year.—*Cramer v. Grand Rapids Show Case Co.*, N. Y., 119 N. E. 227, 223 N. Y. 63.

87. —Implied Warranty.—Where party buys eggs under contract that he must inspect eggs when put in storage and must stand any depreciation thereafter, and pay for them as he gets them, there is no implied warranty that eggs will be merchantable when delivered.—*E. P. Stacy & Sons v. Moher*, Mich., 166 N. W. 849.

88. —Tender.—Where defendant sold garage and agreed to assign lease to plaintiff and the landlord refused to permit the assignment, defendant's tender of the price back, with the statement that he could not assign the lease, was not a rescission, since the vendor may not rescind for his own default.—*Ward v. Carey*, Mich., 166 N. W. 952.

89. —Transfer of Title.—Contract by which a sawmill company agreed to manufacture lumber according to specifications, to be stacked in its yards and loaded on cars under inspection of buyer, which had made advancements and agreed to pay the balance due when lumber was loaded, did not of itself convey either title or possession of the lumber.—*Tallahatchie Lumber Co. v. Thatch*, Miss., 78 So. 154.

90. —Warranty.—If there was failure of warranty of seller of endless power belt in respect to length of service, fitness, and merchantable

quality, buyer should have rejected and offered to return belt within reasonable time, otherwise implied warranty was terminated by acceptance.—*Lumbermen's Supply Co. v. Poplarville Saw-mill Co.*, Miss., 78 So. 157.

91. **Sheriffs and Constables**—Personal Liability.—Sheriff is not liable for damages for personal injury to a citizen inflicted recklessly by a deputy sheriff, unless it was done in violation of an official duty or in an unfaithful and improper performance of an official act.—*Sanders v. Humphries*, La., 78 So. 168.

92. **Specific Performance**—Sale.—Where contract for sale of ores by mining company and their purchase by smelting company provided for assignment, assignment of contract did not relieve assignor of liability so as to prevent specific performance.—*American Smelting & Refining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co.*, U. S. D. C., 248 Fed. 172.

93. **Street Railroads**—Contributory Negligence.—Where driver of electric automobile, which could have been stopped in from six to ten feet went forward, though he saw approaching street car was near, he was guilty of contributory negligence.—*Miller v. Detroit United Ry.*, Mich., 166 N. W. 870.

94. **Subrogation**—Foreclosure.—Where joint owners sold subject to mortgage to one who gave a second mortgage, and the first mortgagee foreclosed and the second mortgagee purchased for a sum sufficient to pay both mortgages, but insufficient to pay costs of the first foreclosure, the second mortgagee held not entitled to be subrogated to rights of the first mortgagee against the joint owners.—*Fry v. White*, Ark., 201 S. W. 1105.

95. **Telegraphs and Telephones**—Contracts.—An exclusive contract between a local and long distance telephone company, which can be terminated on 30 days' notice by either party, is not good ground for a permanent injunction against enforcement of an order of the Public Service Commission that another local competing company, with 1,500 subscribers, be allowed to connect with the long distance company.—*Northern Indiana & Southern Michigan Telephone, Telegraph & Cable Co. v. People's Mut. Telephone Co. of La Grange*, Ind., 119 N. E. 212.

96. —Evidence.—That proprietor of telephone exchange directed defendant, one of his patrons, to go to bank and get rebate on account of service complained of, etc., does not show, defendant not having received such rebate, that there was an extension of period of service without further payment, entitling defendant during such period to retain possession of telephone instrument.—*Moore v. Harneck*, Mich., 166 N. W. 987.

97. **Time**—Sunday.—Under a bond conditioned that buyer should pay for live stock within 48 hours after delivery with a provision for non-liability in case of previous sales not paid for within 48 hours, if such period ended on Sunday, that day was not to be counted under Gen. St. 1913, §§ 6010, 9412, subd. 21.—*Hughes v. Globe Indemnity Co.*, Minn., 166 N. W. 1075.

98. **War—Espionage Act**—Under Espionage Act June 15, 1917, §3, denouncing willfully making or conveying of false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, false reports and false statements import reports and statements of facts, and not accused's beliefs, intentions, and arguments; but slanders of the President and of the nation are false reports and statements within the act.—*United States v. Hall*, U. S. D. C., 248 Fed. 150.

99. —Description of Property.—The description of land in a will as "forty acres of land to include the dwelling house and the old field . . . of the premises on which I now live" is sufficient to pass the title to the land covered by the dwelling house and the old field.—*Blanton v. Boney*, N. C., 95 S. E. 361.

100. —Legatees.—A will giving a legacy "for each grandchild I may leave surviving me, whether now or thereafter born," contemplates every grandchild whose identity may be established at the time of testator's death, and includes grandchildren en ventre at that time.—*Fuller v. Gale*, N. H., 103 Atl. 308.

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UNCONSTITUTIONALITY OF THE CHILD LABOR ACT.

By a majority of five to four, U. S. Supreme Court has declared unconstitutional the Child Labor Act of Congress, denying admission to interstate transportation of goods manufactured in a factory wherein, within thirty days prior to their shipment, children under the age of fourteen years have been employed or permitted to work at all, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of 7 o'clock, p. m., or before the hour of 6 o'clock a. m. Hammer v. Dagenhart, not yet reported.

The form of this act easily discloses that it is not for any inherent quality in goods, in the manufacture of which child labor participates, that attempt is made to deny to them facilities in interstate commerce. Any of such goods, which might be manufactured through child labor within thirty days of their removal from a factory, could not be deemed different in essential quality from those removed after such period had elapsed, unless one may conceive that there is, so to speak, an odor that may remain for thirty days unlike that spoken of by the poet:

"You may break, you may shatter, the vase if you will,
"But the scent of the roses will hang round it still."

The act, then, places an embargo on such goods for a limited time after manufacture not for any quality in the goods themselves, but to repress methods in their manufacture: in other words, the control of transportation creates a classification for ulterior reasons having no relation to commerce as commerce or to the

protection of articles therein, with which such goods may become commingled.

In this way the goods are not in a class like Lottery Tickets, which as a means of gambling are inherently bad, as held in Champion v. Ames, 188 U. S. 321; nor can they be regarded as bad eggs within principle under the Pure Food and Drug Act, as held in Hipolite Egg Co. v. United States, 220 U. S. 45; nor as a tainted individual under the "White Slave Traffic Act" as decided in Hoke v. United States, 227 U. S. 308; Caminetti v. United States, 242 U. S. 470; nor morally objectionable like intoxicating liquors as decided in Clark Distilling Co. v. Western Maryland Ry. Co., 242 U. S. 311.

In the last cited case the prohibition was grounded on the fact that "the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace."

Here is an intimation that to sustain a law forbidding shipment in interstate commerce there ought to be something of an "exceptional nature" in the subject forbidden to be so shipped, and that the commerce clause does not vest an arbitrary discretion in Congress as to articles offered for such shipment. Its discretion may be broad, but it is not unlimited.

Referring to the cases above cited, Justice Day, speaking for the majority says: "In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the result intended."

It is easy to see that the purpose of shipment of a lottery ticket, or of decayed

food, or of a woman for purposes of prostitution, or of intoxicating liquor is but a step in the prosecution of an illegal, unsanitary, immoral or other purpose contrary to public policy. It is hard to see how the shipment of goods manufactured in a way not violative of local law and not forbidden to be sold in any state to which they are destined, could be supposed to have any ultimate evil effect, even were local law either at the place of manufacture or the place of destination to attempt regulation. This regulation might, at least in the latter place, run counter to lawful rights of shippers under the commerce clause. It would be deemed a direct burden on interstate commerce.

Justice Holmes, speaking for himself, and Justices McKenna, Brandeis and Clarke, dissenting, argues that: "Regulation means the prohibition of something and when interstate commerce is the matter to be regulated, I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid." He then cites the Lottery case, but that as we see is distinguished by Justice Day as presenting the accomplishment of an ultimate evil, and so we think may be distinguished generally the other cases which Justice Holmes cites.

The manner in which he concludes his dissenting opinion deserves to be reproduced:

"The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it could be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude

within its sphere from that of some self-seeking state."

He thought also that, if interstate transportation of liquor is forbidden it ought also to be admissible to prevent shipment of something that is the "product of ruined lives."

But lottery tickets and intoxicating liquors are denied shipment as part of interstate commerce, only because they serve an ulterior purpose opposed to public policy. This is not so as to goods, the product of child labor. There is nothing intrinsically objectionable in such goods as there is in lottery tickets and in intoxicating liquors.

NOTES OF IMPORTANT DECISIONS.

FEDERAL EMPLOYERS' LIABILITY ACT—AFFIRMANCE OF JUDGMENT CONTINGENT ON REDUCTION OF AMOUNT.—May a judgment awarding excessive damages, in opinion of a reviewing court, be reduced as condition of affirmance in a suit under Federal Employes' Liability Act? Second Appellate Division of New York Supreme Court, answers this query in the affirmative. *Field v. New York, N. H. & H. R. R.*, 170 N. Y. Supp. —.

It has been held by U. S. Supreme Court that: "In a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial of excessive damages * * * is authorized, according to its own estimate of the amount of damages, which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury." *Kennon v. Germer*, 131 U. S. 22, 29.

Also the federal act provides for estimation of damages being made by the jury "in proportion to the amount of negligence attributable to such employe," and last "all questions of negligence and contributory negligence shall be for the jury."

It seems well settled that in actions in state courts under this federal statute state law is to be followed in all matters of practice and procedure, and all questions of substantive law are governed by the federal court. Does the query above concern a substantive right, or does it come under a state rule of practice and procedure? It seems to us that the federal

act by painstaking language has made it a substantive right that the jury shall pass upon the amount of the dispensation that is to be allowed to a defendant for the proportion of fault attributable to an employe, even though it might be thought that the general principle declared might not necessarily control in a case of abatement from the amount declared in a judgment for a tort.

Let us suppose it to be within the province of state law to provide, that a jury by its verdict in a case, under the federal act, should specify amount of recovery for the injury and also should say how much of that is to be recovered for the proportionate fault of the employes, could the court say too little had been allowed by way of reduction? Certainly under the act and under the principle in the Kennon case, it could not touch the former sum recovered for the injury—and it seems to us that the amount for contributory negligence is as strongly submitted to the jury for determination. The act appears industriously to place within the power of the jury one question just as it does the other. It is a matter of substantive right, both in the aspect of negligence and in contributory negligence, and there is want of jurisdiction in the state court to do aught else than to affirm or reverse, so far as amount of damages is concerned, any local practice to the contrary notwithstanding.

PARTNERSHIP—STOCKHOLDERS OF DE FACTO CORPORATION.—In *Wesco Supply Co. v. Smith*, 203 S. W. 6, decided by Arkansas Supreme Court, it was held that where an attempt to form a corporation was not perfected by filing its articles in the office of the Secretary of the State, after having filed them in the office of the county clerk, and the incorporators and others purchasing its stock held themselves out to the public and to those dealing with the alleged corporation, it was a de facto corporation and there was no liability of its stockholders as partners.

The rule as generally supported is that there must be a statute attempted to be complied with to constitute a de facto corporation and a subsequent holding out itself as such, and though there be an appropriate statute authorizing organizations as corporations, there must be good faith in an attempt to comply therewith. In the instant case it does not appear whether there was an honest effort to comply with the statute or not. There seemed not the slightest ambiguity in the organizing statute. It required a filing, first, with the County Clerk, and a final filing with the Secretary of State.

All that was done was purely as preliminary to obtaining a certificate evidencing the creation of the corporation. The filing with the county clerk was but a step towards procuring the needed certificate, which was to be evidence of incorporation, or, in itself, full incorporation.

Taking it, that the rule invoked by the court does not apply where good faith is not exercised, was it right for the court on any theory of estoppel against a creditor dealing with the corporation as a corporation to determine as matter of law, that incorporators were not liable as partners? Fraud not being sufficient to give a corporation a *de facto* existence, it cuts no figure in the way of estoppel in favor of a participant in the fraud. There was considered in 85 Cent. L. J. 351 a question very similar to that involved in the instant case, and in the case there considered it was expressly stated by the court that there was attempt in good faith to create a corporation. It might be more difficult for the court to say the same in the instant case.

CHARITIES—CERTAINTY OF PURPOSE IN DEVISE—In *Monaghan v. Joyce*, 103 Atl. 582, decided by Chancery Court of Delaware, a devise to a bishop or his successor in a particular diocese "to be applied to such charitable purposes of the diocese of Wilmington, Dela., as he may deem fitting," was held not fatal by reason of uncertainty in its objects.

The court after considering various objections and overruling them, said: "The only feature which requires special consideration is that which imposes on the trustee the duty and right to select the charitable purposes. There are decisions of courts elsewhere, both in England and in this country, which take opposite views as to the validity of such a gift. Some hold it bad because the will of the trustee was substituted for that of the testator in selecting the objects, and others because there was no one who could demand and enforce performance by the trustee. On the other hand, these reasons were held insufficient by the courts." Then the court proceeds to speak of the question not being an open one in Maryland, referring to *Griffith v. State of Dela.*, Ch. 421.

But the devise in this case was sustained on the principle that "a gift to a priest or minister in his public office, to be used by him for such public, religious and charitable purposes as he sees fit, will be held to be charitable, but it must be a gift to the donee in his official capacity to be expended for public charitable

purposes; for, if it is a gift to the person or individual, in his private capacity, for his individual benefit and relief, it will not be charitable, though the individual is described in his official character." But that this principle does obviate the necessity of describing, at least, generally, the purposes of the gift, the inference is the other way.

In the Griffith case there was a description of beneficiaries but there was a wide discretion given to the trustee in their selection. In this will neither the purposes, nor the beneficiaries of the charity are at all indicated, or remotely suggested. It seems to us there was no way of applying the devise either to purposes or beneficiaries. There was nothing to be executed except the will of the trustee and that not within any certain period of time. But Illinois courts appear to rule that though the object be uncertain yet if a trustee has power to make this certain gift may be sustained. *Volunteers of America v. Pierce*, 267 Ill. 406, 108 N. E. 418.

Also the principle of the instant case seems in accord with the ruling re *Kimberly's Estate*, 249 Pa. 469, 95 Atl. 82.

DUTY AND LIABILITY OF ATTORNEY IN REGARD TO HIS KNOWLEDGE OF THE LAW.

Introductory.—It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney at law undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that negligence or want of care for which he is undoubtedly responsible.

"The practice of law is not merely an art, it is a science, which demands from all who engage in it without detriment to the public, special qualifications which can only be attained by careful preliminary study and training, and by constant and unremitting investigation and research. But as the law is not an exact science, there is no attainable degree of skill or excellence at which all differences of opinion or doubts

in respect to questions of law are removed from the minds of lawyers and judges. Absolute certainty is not always possible."¹

"Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians, surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions."²

Reasonable Skill Required.—An attorney at law impliedly represents that he has the learning commonly possessed by members of his profession in good standing, and that he will exercise a reasonable degree of skill.³

Attorneys, counsellors and conveyancers, like agents in any other professional employment, and like all mechanics, artists and other employes, are bound to possess some skill and knowledge of their business or profession. This skill or knowledge must be reasonable in amount, and such as the employer is entitled, in the nature of things, to expect from them. There can be no doubt that they are not responsible for every unskillful or mistaken act they may commit, or for every erroneous opinion they may utter to those who consult and confide in them."^{3a}

He not only professes to be reasonably well acquainted with the law and the rules and practice of the courts, but he is bound to use a reasonable degree of care, pru-

(1) *Citizens' Loan, etc., Assn. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320.

(2) *Citizens' Loan, etc., Assn. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320.

(3) *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Gambert v. Hart*, 44 Cal. 542; *Stevens v. Dexter*, 55 Ill. 151; *Spangler v. Sellers*, 5 Fed. 882; *Morrison v. Burnett*, 56 Ill. App. 129; *Kissam v. Bremerman*, 44 App. Div. 588, 61 N. Y. Supp. 75.

(3a) *Estate of A. B. Tuck* 247.

dence, diligence, and skill in the exercise of that knowledge.⁴

More than ordinary skill and diligence can be required of him only when he enters into a special contract calling for such. Any other rule would subject his rights to be controlled by the vagaries and imaginations of witnesses and jurors, and even to errors committed by courts. "This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine; and especially is this so as to questions of practice, the construction of statutes, and particularly those arising under our criminal and probate laws."⁵

"These all admonish courts and jurors that great care and consideration should be given to questions involving the proper service to be rendered by attorneys when they have acted in good faith, and with a fair degree of intelligence, in the discharge of their duties when employed under the usual implied contract. Under such circumstances, the errors which may be made by them must be very gross before the attorney can be held responsible. They should be such as to render wholly improbable a disagreement among good lawyers as to the character of the services required to be performed, and as to the manner of their performance under all the circumstances in the given case, before such responsibility attaches."^{5a}

If the duty is a plain one, and there are no doubtful questions of law for decision, nor any conflicting mode of procedure to embarrass or mislead, he is liable for a

negligent mission to perform.⁶ He must have sufficient learning to determine, with reasonable accuracy, upon the appropriate rights of his clients, and sufficient skill to conduct the proceedings appropriate to such remedies.⁷

He does not profess to know all the law, or to be incapable of error or mistake in applying it to the facts of every case. Even the most skillful of the profession would be unable to measure up to such a standard.⁸

"God forbid," said Chief Justice Abbott, "that it should be imagined that an attorney, or a counsel, or even a judge, is bound to know all the law."

He is not liable for every mistake that may occur in practice, nor held responsible for every error of judgment in the conduct of his client's cause.⁹

"For the common accountabilities of life, all men, even those of the lowest degree of legal sanity, are presumed to know the law, and are held responsible for its violations. Every member of the legal profession admits the necessity of this rule, and yet we all know that the greatest legal minds have fallen into error. Law is certainly the most comprehensive of all the sciences; its mastery and practice the most intricate of all the professions. Change and progress, if not improvement, are observable at every epoch of its history. If, under these circumstances, members of the legal profession were held accountable for the consequences of each act which may be pronounced an error by the courts of the country, no one, I apprehend, would be found rash enough to incur such fearful risks. On the other hand, it surely cannot

(6) *Hillegass v. Bender*, 78 Ind. 225.

(7) *Hatch v. Fogerty*, 33 Jones & S. (N. Y.) 166.

(8) *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Hillegass v. Bender*, 78 Ind. 225. *Spangler v. Sellers*, 5 Fed. 882; *Humboldt Bldg. Assn. v. Duckner's Exr.*, 111 Ky. 759, 64 S. W. 671.

(9) *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. *Breedlove v. Turner*, 9 Mart. (O. S.) 353.

(4) *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Hillegass v. Bender*, 78 Ind. 225.

(5) *Babbitt v. Bumpus*, 73 Mich. 381, 41 N. W. 417, 16 Am. St. Rep. 585.

(5a) *Babbitt v. Bumpus*, 73 Mich. 381, 41 N. W. 417, 16 Am. St. Rep. 585.

be successfully maintained, that lawyers are a privileged class, not responsible for any, even the grossest want of skill. I hold, that they, like all other professional men and artisans, impliedly stipulate that they will bring to the service of their clients ordinary and reasonable skill and diligence; and, if they violated this implied stipulation, they are accountable to their clients for all injury traceable to such want of skill and diligence."^{9a}

An error of judgment by an attorney upon an unsettled and controverted question of law, is not such gross ignorance as will make him liable to his client for damages resulting from the error.^{9b}

An attorney cannot be charged with want of skill in proceeding to try a cause on a theory which is sustained by the court, although it is contrary to a principle of law.^{9c}

But if, by reason of his ignorance of the law in respect of something of which he ought to be informed, his client suffers injury, he is liable therefor in damages.¹⁰

The fact that he gives a bond that he will faithfully perform his duties, adds nothing to the liability imposed on him by law.¹¹

Well Settled Law.—A lawyer is without excuse who is ignorant of the ordinary settled rules of pleading and practice, and of the statutes and published decisions in his own state, but he is not to be charged with negligence where he accepts as a correct exposition of the law, a decision of the Supreme Court of his own state. Nor can he be held liable for a mistake in reference to a matter in which members of the profession possessed of reasonable skill and knowledge, may differ as to the law

(9a) *Goodman v. Walker*, 30 Ala. 482, 495, 68 Am. Dec. 134.

(9b) *Morrill v. Graham*, 27 Tex. 646.

(9c) *Avery v. Jacob*, 15 N. Y. Supp. 564.

(10) *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *Stevens v. Dexter*, 55 Ill. 151; *Reilly v. Cavanaugh*, 29 Ind. 435; *Morrison v. Burnett*, 56 Ill. App. 129; *Morrill v. Graham*, 27 Tex. 646.

(11) *Humboldt Bldg. Assn. v. Duckner's Exr.*, 111 Ky. 759, 64 S. W. 671.

until it has been settled in the courts; nor if he is mistaken in a point of law on which reasonable doubt may be entertained by well informed lawyers.¹²

He is bound to understand and apply those rules and principles of law that are well established and clearly defined in the elementary books, or which have been declared in adjudged cases that have been duly reported and published a sufficient length of time to have become known to those who exercise reasonable diligence in keeping pace with the literature of the profession.¹³

Thus, it has been said: "He is liable for the consequences of ignorance or non-observance of the rules of practice of his court, for the want of care in the preparation of the cause for trial. Whilst, on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction."¹⁴

If the law governing the bringing of a suit is well and clearly defined, both in the text books and in the decisions, and the rule has existed and been published long enough to justify the belief that it is known to the profession, a disregard of such rule by an attorney renders him accountable for the losses caused thereby.¹⁵

"If all of us had to go out for mistakes of judgment upon points of new occurrence, or of nice or doubtful construction, it is apprehended that the ranks of the profession, and of judges, not final in their jurisdiction, would be decimated at an appalling rate. We recognize and approve the rule attaching liability to the attorney whose client suffers loss on account of his

(12) *Citizens' Loan, etc., Assn. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320; *Hillegass v. Bender*, 78 Ind. 225.

(13) *Citizens Loan, etc. Assn. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320.

(14) *Godefroy v. Dalton*, 6 Bing. (Eng.) 460.

(15) *Goodman v. Walker*, 30 Ala. 482, 68 Am. Dec. 134.

failure to understand and apply well-established principles of law, settled by text books and cases published long enough for him, exercising reasonable diligence, to have informed himself of them. In other words, an attorney has no right to be a clam, and shut himself up in the seclusion of self-conceived knowledge of the law. He must keep pace, so far as reasonable diligence and a fair amount of common sense will enable him to do so, with the literature of his profession, and what the courts have decided. But the law does not require and never has required of a member of the profession that he should be a true Sir Oracle of what the courts have decided or will decide as the law applicable to every given state of facts."¹⁶

Recently Enacted Statute.—Soon after the death of the claimant's husband her stepson demanded his share of his father's estate, and urged a partition suit. The claimant applied to the present testator, who was her attorney, for professional advice. The testator gave her advice without, it seemed, consulting the statute book of the preceding year, and advised her that, as widow, she had a dower interest only in the realty of her husband. A compromise was effected with the son, and a probable expense of a partition induced a pecuniary arrangement. Most of the personal property of the estate was set apart to the stepson, who released his claim to the real estate to his stepmother and half brother. The present testator drew the papers, and superintended their execution and delivery. At the death of the claimant's husband there was in effect the following law, passed the year before the transaction in question: "At the decease of the husband or wife, intestate, leaving minor child or children, the survivor shall hold, possess and enjoy all the real estate of which the husband or wife died seized, and all the rents, issues and profits thereof, during the minority of the youngest child.

and one-third thereof during his or her natural life."

The mistaken advice of her attorney having caused her considerable loss, the claimant sought to recover against his estate. In holding the estate to be liable for the testator's mistake, the court in part said: "In the present case, it is impossible to impute to the testator, the legal adviser, a want of knowledge, or of skill in his profession, in the ordinary acceptation of such a phrase. All who knew him could testify to his long and honorable career of laborious duty, continued through forty years of successful practice at the bar. The error arose from want of diligent watchfulness in respect to legislative changes. He did not remember that it might be necessary to look at the statutes of the year before. Perhaps he had forgotten the saying, that 'no man's life, liberty or property are safe while the Legislature is in session.'"¹⁷

Law of Foreign State.—It has been held that an attorney is not presumed to know the law of a state other than the one in which he is practicing. An attorney who was practicing in New York, and who undertook to draw a contract for building on land in New Jersey, did not, by undertaking such employment, impliedly represent that he was acquainted with the laws of the latter state respecting the necessity of filing such contracts for protection against claims of workmen and materialmen under the mechanics' lien law.

"In assuming the employment of plaintiffs, the skill and knowledge they professed, must be considered with reference to the locality of their practice. In the absence of any express declaration on the subject, they will be presumed to have held themselves as possessing such skill and knowledge as attorneys practicing there might reasonably be supposed to possess, and no more. As attorneys of New York, they are not to be presumed to know the laws

(16) *Hill v. Mynatt, Tenn., 1900, 59 S. W. 163.*

(17) *Estate of A. B., Tuck. 247.*

of a foreign state. Nor did they impliedly undertake that they had such knowledge, by accepting an employment which, as we have seen, was, in terms, limited to drawing a contract in all respects binding between the parties."¹⁸

Proceedings in Sheriff's Office.—An attorney must be held to know the return day of process issued by his direction, must keep himself informed of the steps taken by the sheriff in its execution, and must give all instructions necessary to secure his client's interests. "It is usual for the attorney, on execution process, to give directions respecting the property which he desires should be sold, especially when this is real estate; and, if he omits this, he should, at least, ascertain what has been done in the premises by the sheriff and act as the interest of his client requires. He must be held to know that when the return day of a *f. fa.* has passed without a levy, the *writ is functus officia*; that a *vend. ex.* is issued only for a sale by virtue of a levy made on an antecedent writ; and he must at all times inform himself of the state of the record, and of the sheriff's proceedings, before taking or directing any further step based thereon."¹⁹

Passing on Title to Real Property.—An attorney was employed to pass upon the security of a contemplated mortgage to be given by husband and wife, who held the property by the entireties, as security for a loan. Prior to this time the Supreme Court of the state had never held that a mortgage executed by a husband and wife, on lands held by them as tenants by entireties, was void as to both of them. He advised that the mortgage would be good, which proved, by a subsequent decision of the Supreme Court, to be erroneous as matter of law. It was held that the error must be regarded as one into which any reasonably careful and prudent lawyer

might have fallen, and that he was not liable therefor.²⁰

Said the court, in part: "Now, while it is quite true that section 5119, R. S. 1881, which took effect September 19, 1881, prohibited a married woman from entering into any contract of suretyship, and declared all such contracts void as to her, and while it had been thoroughly settled that a married woman who had joined in a mortgage of her separate property to secure the debts of her husband was to be regarded as his surety, it had never been held prior to January 23, 1884, when the judgment in Dodge v. Kinzy, 101 Ind. 102, was pronounced, that a mortgage executed by a husband and wife on lands held by them as tenants by entireties, was void as to both of them. It cannot fairly be said, therefore, that before the decision in Dodge v. Kinzy was made and promulgated, so as to have become known by those reasonably diligent in the profession, it was such a mistake to advise that a husband and wife might secure a debt of the former on his estate in lands held by himself and wife by the entireties, as could only have resulted from the want of ordinary knowledge and skill, or from the failure to exercise reasonable care and caution."

An attorney, who had been employed to examine titles to land on which loans were to be made, approved a title without reporting certain liens held by subcontractors by virtue of a local statute. It was held that the fact that it was a doubtful legal question whether or not the statue had been repealed, and that the failure to report the liens was due to an honest mistake of judgment, was matter of defense, and that it was therefore error to sustain a demurser to a petition to enforce the attorney's liability for the loss sustained, alleging that the attorney might have known of the existence of the liens by the exercise of ordi-

(18) *Fenaille v. Coudert*, 44 N. J. L. 286.

(19) *Enterline v. Miller*, 27 Pa. Super. Ct. 463.

(20) *Citizens' Loan, etc., Assn. v. Friedley*, 123 Ind. 143, 23 N. E. 1075, 7 L. R. A. 669, 18 Am. St. Rep. 320.

nary care. In regard to the statute in question, the court in part said:

"Whether this question (doubt as to existence of statute) raised actually existed in the minds of the profession then is one of fact. If it did, and the attorney honestly believed that the subcontractors had no lien because of that fact, then the jury may be warranted in finding for the defendant. But if the attorney was ignorant of the existence of the statute, or had forgotten it at the time of this transaction, or if, knowing of it, he carelessly failed to acquaint himself with the facts as to the subcontractors' claim for liens till after he had paid out appellant's money, we are of opinion that he would be liable."²¹

Insufficient Affidavit for Attachment.—An attorney, upon order, made an attachment which was subsequently dissolved on account of the insufficiency of the affidavit, in that it did not state his source of information. The statute regulating such matter provided that the judge must be satisfied by affidavit that a cause of action exists, and that the plaintiff is entitled to recover the sum stated, over and above all counterclaims. The attachment was made in New York city, and there were but two decisions (both in other judicial departments of the state) clearly holding such affidavits insufficient. There was one decision in another department, and one in the same department, which had been affirmed by the court of last resort, and several in other states having similar statutes, holding such affidavits to be sufficient. It was held that the attorney was not liable, as the insufficiency of such an affidavit was not clearly enough established. Said the court:

"It cannot be held that there was clear reading of the statute against this affidavit, but rather that on its face it seems to favor it. The attachments were vacated by the order of the special terms, based entirely upon the ruling that the affidavit was in-

sufficient upon its face, because made by an attorney, without stating the sources of knowledge, although all facts are stated positively. On appeal to the general term this order was affirmed. It was not carried to the court of appeals, and this decision is conclusive upon the litigants there, and may become the rule of that department, otherwise in some future case. The fact of this adverse decision cannot of itself serve to charge liability upon the defendant, for that would require of the attorney a foreknowledge or insurance of what might be decided by the courts upon questions which are new or open to doubt,—a requirement beyond all rule or reason, and which cannot be imposed."²²

Paying Money to Clerk in Satisfaction of Judgment.—It is the duty of a lawyer to know whether public matters, such as the duties of the officers connected with the court in which he practices, are regulated by statute. "A lawyer who does not know whether the duties of the clerk of the court in which his professional duties are performed are, or are not, defined by statute, cannot be deemed to possess competent skill."²³

An attorney represented a litigant against whom judgment was rendered. Therefore his client placed money in his hands for the purpose of paying the judgment, and the attorney paid the money to the clerk of the court, who made a proper entry of satisfaction of judgment. The clerk had no authority to receive the money, but the client knew of the payment to the clerk and made no objection thereto. Later the clerk died insolvent without having paid the money to the judgment creditor. It was held that the attorney was bound to know that, under the law then existing, the clerk had no authority to receive the amount of the judgment; that the money should have been paid to the judgment creditor or to some one duly authorized by him, but

(21) Humboldt Bldg. Assn. v. Ducker's Exr., 111 Ky. 759, 64 S. W. 671.

(22) Ahlhauser v. Butler, 57 Fed. 121.

(23) Hillegass v. Bender, 78 Ind. 225.

that as he merely acted as agent for his principal, who had full knowledge of his acts, and acquiesced therein, he was not liable for the loss; that to fasten on him the liability of an attorney, for ignorance of the law, a consultation touching the question of law, and a special employment to make the payment in pursuance of his negligent advice, must be shown, as the general power of an attorney for a defendant ceases upon the entry of a judgment, finally terminating the litigation. Said the court "A rudimental knowledge of the law would have acquainted the appellant's intestate with the elementary rule, that payment must be made to the creditor, or to some one duly authorized to act for him. A rule so long settled and so familiar ought to be known to all who assume the characters of lawyers. A knowledge of the statutes would have shown the intestate that there was in them no provision changing the familiar and long established rule."²⁴

Failure to File Claim Under Foreclosure.—The defendants, attorneys at law, were employed to prosecute a claim for wrongful death against a railroad corporation, and after extended litigation succeeded in procuring judgment. In the meantime, however, the railroad had been sold under foreclosure in a federal court, and the assets exhausted. Defendants investigated the advisability of filing their claim in the federal court, and decided, in good faith, that it should proceed to judgment in a state court. Had they filed the claim in the federal court, it would have been paid. It was held that, as the question passed upon by the defendants was a doubtful one, they could not be held for the error of judgment.²⁵

Failure to Move for New Trial Before Appealing.—The defendant attorney was employed to conduct a suit in which, after

judgment was rendered, it became his duty to move for a new trial. This he did not do, but instead appealed the case to the Supreme Court (of Ohio). There was a statute in effect, which required that a motion for a new trial be made and overruled, and exceptions taken thereto, before it would be considered by the higher court. In passing upon the failure of the defendant to make such motion, in consequence of which the right of appeal was forever lost, the court said:

"This statute seems to be unambiguous in its terms, and it had been in existence for four years; and the knowledge of its provisions should ordinarily and reasonably have been possessed by one who undertook to conduct legal proceedings of that character; and the ignorance of or failure to apply such knowledge by the defendant was negligence."²⁶

If an attorney submits a motion for a new trial before the statement in support of it is certified, he is guilty of a want of ordinary care and skill.²⁷

Wrong Kind of Suit.—The plaintiff alleged that he had a contract with a corporation for his employment at stated wages during his natural life, which was breached by the corporation discharging him; that he employed defendants, attorneys, to prosecute his claim against the corporation; that through negligence or gross ignorance of the law they brought an action to recover wages under the contract to that date, and recovered, but that such recovery operated as a bar to any subsequent action, because the damages for breach of the contract were indivisible, and that a second suit brought by defendants failed for that reason. Plaintiff's testimony, however, was to the effect that some agents of the corporation agreed to employ him as long as they were with the company, or as long as the company was in existence. His

(24) *Hillegass v. Bender*, 78 Ind. 225.

(25) *Hill v. Mynatt*, Tenn., 1900, 59 S. W. 168.

(26) *Spangler v. Sellers*, 5 Fed. 882.

(27) *Gambert v. Hart*, 44 Cal. 542.

second suit in reality failed because of his failure to comply with an order of court requiring security for costs. It was held that, assuming that the plaintiff stated his case to defendants in accordance with his testimony, they were not negligent in proceeding as they did.

"Such a contract was so dependent and uncertain in its duration that assuredly no lawyer would conclude that a recovery could be had thereon based upon a life tenure in the plaintiff. Then, taking the other horn of the dilemma, based upon his own statement that they would give him employment so long as said company was in business, it was a contract made with the then existing company, whose life depended upon the duration of its claim to existence except as based upon its charter, which limited its life from its inception, in 1882, to 20 years. The cause of action alleged in the petition is not based upon this theory, but upon the existence of the life on the plaintiff."²⁸

Suit Under Wrong Statute.—Where attorneys were employed by the employers of apprentices to take proceedings against the latter for misconduct, and the attorneys specially proceeded under a section of the statutes relating to servants and not to apprentices, it was held that this was an instance of such want of skill or diligence as to render the attorneys liable to repay to their clients the damages and costs occasioned by such error.²⁹

Suit in Wrong Court.—In the English case of *Williams v. Gibbs*,³⁰ it was held that an attorney who brought an action for his client within a limited jurisdiction, on a cause of action arising out of such jurisdiction was liable therefor.

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St. Louis, Mo.

(28) *Eberhardt v. Harkless*, 115 Fed. 816.

(29) *Hart v. Frame & Co.*, 6 Cl. & F. 193, 3 Jur. 547.

(30) 6 N. & M. 788, 2 Harr & W. 241.

BANKS AND BANKING—TRANSFERS OF STOCK

ALEXANDER v. DEVER.

Court of Appeals of Georgia, Division No. 2,
95 S. E. 777.

April 11, 1918.
(Syllabus by the Court.)

One holding stock in a bank, as life tenant under the will of the original subscriber, transferred to her by the executors of the estate, is individually liable in an amount equal to the face value of the stock, in a suit brought by the receiver of an insolvent bank for the benefit of the depositors, under the provisions of the Civil Code 1910, § 2270.

Error from Superior Court, Richmond County; H. C. Hammond, Judge.

Suit by Irwin Alexander, receiver of the Irish-American Bank, against Ellen Dever. From a judgment dismissing the suit, plaintiff brings error. Reversed.

Alexander, as receiver of the Irish-American Bank, brought suit against Ellen Dever, to collect from her as a stockholder of the bank an amount equal to the face or par value of the shares of its stock owned and held by her at the time of its failure. The petition alleged that the said shares were subscribed for by James Dever, and by his will were bequeathed to Ellen Dever, and that they were delivered to her by the executors of the will; that she was a life tenant under the will, and the stock was held by her as such life tenant. When the case came on for trial, she moved to dismiss the suit, on the ground that the petition showed no cause of action against her. The court sustained the motion and dismissed the suit, and the plaintiff excepted.

HARWELL, J. The trial judge, in dismissing the petition, no doubt based his ruling upon the decision of this court in the case of *Swicord v. Crawford*, 20 Ga. App. 35, 92 S. E. 394. The Supreme Court, on certiorari, reversed the ruling of the Court of Appeals, and held that:

"Stockholders in a bank incorporated under the laws of this state, since the passage of the act of 1893, whether original subscribers, or purchasers of stock from the corporation, or transferees of such stockholders, are individually liable equally and ratably (and not one for another as sureties) to depositors of said corporation for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock."

The petition in the instant case set out a cause of action. The fact that the defendant

is holding the stock as a life tenant of the original subscriber, James Dever, will not relieve her from liability. It is alleged that the executors have delivered the stock to her under a deed or bill of sale, and that she is now the holder of said stock.

The language of the federal statute (Revised Statutes, § 5151 and section 5152 [U. S. Comp. St. 1916, § 9690]), fixing the liability of shareholders of every national banking association, is very similar to that in the Code of this state (Civil Code of 1910, § 2270). The Supreme Court of the United States has construed the federal statute, and the following decisions are in point in the instant case:

"The widow and heirs of a shareholder in a national bank, to whom the probate court allots the shares of stock in indivision, in proportion to their interest in the estate, but who let the stock stand in the name of the deceased, without any notice of their title to it, are liable * * * to assessments on the stock in case the bank subsequently becomes insolvent." *Mattenson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571.

"On the death of a stockholder, this liability passes immediately to his estate, and would do so even were it not for paragraph 5152 of the Revised Statutes. This is not by virtue of any new contract, as the liability rests on the stock and is a part of the contingent liability of the estate. *Parker v. Robinson*, 71 Fed. 256, 18 C. C. A. 36; *Tourtelot v. Finke* (C. C.) 87 Fed. 840.

"The beneficiaries of stock held in trust by a trustee are subject to the stockholder's liability." *Smathers v. Western Carolina Bank*, 155 N. C. 283, 71 S. E. 345, Ann. Cas. 1912C, 398; *Witters v. Sowles et ux.* (C.C.) 32 Fed. 767.

"M. bequeathed to his wife, for life or widowhood, 40 shares of stock in the national bank, together with other personal property, providing she might use any of such personal property if necessary for her comfortable support, and that, at her death or marriage, whatever should remain of such property should go in equal shares to his four children. The administrator with the will annexed of M.'s estate transferred the stock on the books of the bank to M.'s widow. The bank having become insolvent, and an assessment having been made by the comptroller on the shareholders, for which a judgment was obtained against M.'s widow, which remained unsatisfied, the receiver of the bank brought suit against M.'s administrator to compel payment * * * out of M.'s general estate. Held that, whether the widow took an absolute title to the stock by virtue of her power of disposal, or a life interest with remainder to the children, the beneficial ownership of the stock, in either case, had passed from M.'s estate, and the estate could not be made liable for the assessment. Held, further, that the administrator properly transferred the stock to the widow, and was not required to hold the legal title

thereto, as administrator or trustee, during her life or widowhood, but that such transfer made no difference to the liability of the estate of M., since the beneficial interest would in either case have been in the widow and children." *Blackmore v. Woodward*, 71 Fed. 321, 18 C. C. A. 57.

See, also, *Christopher v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740. See, also, *Chatham v. Brobston*, 99 Ga. 801, 27 S. E. 790, headnotes 2 and 3, where it is said:

"Where the charter of the bank imposes on all of its stockholders personal liability to its creditors, such liability attaches as well to those who acquire a complete legal title to the stock of the bank by having the same transferred to them as collateral security for debts due by the transmitters, as to those who purchase such stock outright. * * * A stockholder is individually liable for his pro rata part of the corporation debts created before he acquired his * * * stock by transfer, as well as for a like part of those created during his ownership of the shares."

The court erred in dismissing the petition. Judgment reversed.

BROYLES, P. J., and BLOODWORTH, J. Concur.

NOTE.—Life Tenant Stockholder in Bank Liable to Depositors as Absolute Owner.—The case of *Crawford v. Swicord*, Ga., 94 S. E. 1025, in which Georgia Supreme Court reversed *Swicord v. Crawford*, 20 Ga. App. 35, 92 S. E. 394, was not a case of a life-tenant stockholder in a bank, but the Georgia Court of Appeals deduces the ruling it made against such life-tenant holder from the reasoning of Georgia Supreme Court.

This reasoning proceeded upon the theory that the double liability was to protect depositors because the stockholders have "the power and authority to control and manage the affairs of the bank. When one becomes a stockholder, whether by subscription to the stock, or by purchase from one who thus acquired his stock, he comes into the power to manage and control the affairs of the corporation, and his liability to depositors therein is rightly connected with this power to control and direct the affairs of the corporation."

It is suggested, that here is presented an interesting query, and that is whether trustees holding stock might be made liable, because of the power they are entitled to exercise over the management of a bank. Furthermore, if a life tenant is made, primarily, liable on this theory, has he any recourse against a remainderman for what he may be compelled to pay out on such a liability?

It has been held that a married woman is liable under the statute for double liability upon bank stock, because such liability is statutory and not contractual. *Christopher v. Norvell*, 201 U. S. 216, 26 Sup. Ct. 502, 5 Ann. Cas. 740.

The federal statute was there considered and this expressly provides that no personal liability attaches to "executors, administrators, guardians

or trustees," but the estates of which they are the representatives shall be liable. In this case the married woman owned the entire interest in the stock. It was shown that she had received several dividends on the stock prior to the bank becoming insolvent. She was not an original subscriber, but acquired same under will of her father.

Justice Harlan said: "The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they cannot enjoy the benefits accruing to shareholders and escape liability for the contracts, debts and engagements of the bank."

In Smathers v. Western Carolina Bank, 155 N. C. 283, 71 S. E. 345, Ann. Cas. 1912 C 398, the court goes on the theory that notwithstanding coverture or any disability to contract, a married woman becomes liable under the federal banking act just as she would be "for debts contracted for necessities for support of the family or to obtain money to pay antenuptial debts."

In Golden v. Niblack, 278 Ill. 409, 116 N. E. 273, the state constitution providing for double liability of stockholders in a banking corporation was considered, and this was held to hold shareholders to creditors for all liabilities accruing while one is a stockholder.

In Mosler Safe Co. v. Guardian Trust Co., 208 N. Y. 524, 101 N. E. 786, it was held by force of the statute, that stockholders who were such when a debt is contracted and any subsequent stockholder may be made liable therefor, but there can be only one recovery. There is nothing said as to the theory upon which the law proceeds, but the courts merely construe its terms. C.

CORRESPONDENCE

CRIMINAL LAW—PLACE OF HOLDING COURT.

Editor, Central Law Journal:

Under the caption "Criminal Law—Place of Holding Court," No 21 of the present volume of the Journal, at page 377, gives the opinion of the Supreme Court of Arkansas in Mell v. State, 202 S. W. 33, reversing a conviction for an assault with intent to rape; and an editorial note is added in which additional authorities are cited. The reason assigned for reversal is that in the trial of this case the prosecuting witness, being ill and at a hotel, was examined as a witness, before the court and the jury, at the hotel and not in the Court House, and was also examined at the hotel in rebuttal after the testimony of the accused was given in the Court House. That the trial was thus partly at the hotel and not in the Court House was the objection taken. The editorial note closes with the intimation that

in such matters "a court is vested with some discretion in emergency."

Such intimation was certainly quite appropriate, for it is questionable whether the discretion of the trial court in such matters should be limited to civil cases and held to be unallowable in a criminal case. The decisions in Kentucky and Wisconsin, quoted in the principal case, seem to be as applicable in reason to criminal cases as well as to those on the civil side of the courts.

THOMAS DENT.

Chicago, Ill.

HUMOR OF THE LAW.

An old lady came into court one day, and said to his honor:

"Are you the judge of reprobates?"

"I am the judge of probate, madam. Perhaps that is what you mean."

"Well, I expect it is. My husband died detested and left several small infidels and I want to be their executioner."

When soldiers are sent to the base hospital, they turn in their clothing and receive pajamas and a bathrobe.

A negro soldier was brought in, and while a record was being made of his clothing and personal effects, an orderly asked him if he had pajamas. The darky grinned painfully, and said:

"No, sah, it's mumps!"

Two political candidates were discussing the coming local election.

"What did the audience say when you told them you had never paid a dollar for a vote?" queried one.

"A few cheered, but the majority seemed to lose interest," returned the other.—Harper's.

Morris Hillquit, the New York Socialist, was discussing the Bolsheviks.

"The Bolsheviks," he said, "are so dreadfully up against it that they remind me of the editor of the Cinnaminson Scimitar."

"This has been a very lucky day for me," the editor said at supper to his wife.

"His wife's harassed face brightened.

"Did somebody pay a subscription, George?" she asked.

"Well, no," said the editor. "It wasn't as lucky as all that. I was shot at and missed."

WEEKLY DIGEST

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1. Adverse Possession—Statute of Limitations.—Trespass to Try Title. Where commissioner, pursuant to decree in partition suit, conveyed land by deed dated December 11, 1896, and grantee who took immediate possession and those holding under him down to and including defendant have had continued adverse and uninterrupted possession of land, using and cultivating same from date of purchase until November 9, 1914, defendant would have title under ten-year statute.—Boese v. Parkhill, Tex., 202 S. W. 120.

2. Appeal and Error—Statutory Construction.—Under Act Cong. March 3, 1891, § 11, declaring that no appeal or writ of error shall be taken or sued out except within six months after entry of judgment order or decree to be reviewed, a writ of error cannot, where six-months period expires on Sunday, be sued out on following Monday.—Siegelschiffer v. Penn Mut. Life Ins. Co., U. S. C. C. A., 248 Fed. 226.

3. Assignments—Validity.—An agreement by clerk of railroad at Canadian line that he would remit to railroad fees earned by him as customs broker for United States was not invalid as assignment of fees or earnings by public officer.—Duluth, S. S. & A. Ry. Co. v. Wilson, Mich., 167 N. W. 55.

4. Attachment—Attorney's Lien.—Where an attorney, otherwise entitled to a charging lien on a judgment recovered, takes an assignment to himself of the entire judgment, he abandons or waives the lien.—Jernigan Bros. v. Hart, Tenn., 202 S. W. 68.

5. Attorney and Client—Contingent Fee.—Agreement by attorney that client should at least receive the amount she would receive under the "Employers' Liability Law" meant the full amount she could receive under such law, and not an amount previously offered by the employer under such law.—Nichols v. Waters, Mich., 167 N. W. 1.

6.—Disbarment.—An attorney of several years' experience, who for sole purpose of coercing payment of a large sum of money drafted a complaint so indecent and scandalous that it cannot be quoted, will be disbarred; he having been before the court once before in disciplinary proceeding for similar conduct.—In re Hansen, N. Y., 169 N. Y. S. 881.

7. Bankruptcy—Conditional Sale.—Notes embodying separate conditional sale contracts, attached together, and to a separate sheet containing an affidavit as to the aggregate amount due thereon, by brass fasteners, and filed, held invalid under Ohio statute, to preserve the seller's lien against creditors in bankruptcy.—Columbus Merchandise Co. v. Kline, U. S. D. C., 248 Fed. 296.

8.—Mortgage.—Where it was agreed between bankrupt and vendor, who took back purchase-money mortgage, that separate lots should be released from lien of mortgage on fixed payment, and trustee in bankruptcy desired to exercise that right as to lots on which bankruptcy has jurisdiction of proceeding to require vendor to release such lots from lien of mortgage.—In re East Stroudsburg Supply & Construction Co., U. S. D. C., 248 Fed. 356.

9.—Petition for Review.—Petition for review of action of referee in bankruptcy, even if filed only with the clerk, having been treated by the referee as filed with him, was as effective as if first filed with him, and later by him with the clerk.—In re Wood, U. S. C. C., 248 Fed. 246.

10.—Provable Claim.—Under Bankruptcy Act July 1, 1898, §§ 14b (3), 17 (2), both of which were amended in 1903 (Act Feb. 5, 1903, §§ 4, 5), creditor holding provable claim may oppose discharge on ground bankrupt obtained credit on materially false statement in writing, though such creditor's claim would not be barred by discharge.—In re Armstrong, U. S. D. C., 248 Fed. 292.

11.—Set-off and Counterclaim.—Where corporations bought cotton oil and sold like quantities to another corporation, seller having failed to deliver, could not, in action for damages by trustee in bankruptcy of purchaser, have set-off by washing-out process, on theory that oil was really to be delivered to second purchaser, in view of Bankr. Act, § 68, as to set-off and counterclaim.—Planters' Oil Co. v. Gresham, Tex., 202 S. W. 145.

12.—Trustee.—Notwithstanding Bankruptcy Act, § 5, subds. d—f, the court has discretion to appoint different trustees for bankrupt estates of partnership and its members, properly exercised where partner's individual debts exceed his individual estate, and proceeding against partnership has arrived at dividend when that against partner is instituted.—In re Wood, U. S. C. C. A., 248 Fed. 246.

13.—**Void Sale.**—Although a void sale under Civ. Code, § 2369, is validated by a subsequent delivery before liens attach, the burden is on the vendee to show that possession was taken when the vendor was lawfully capable of turning over such property.—Lockhart v. Edge, S. D., 167 N. W. 164.

14.—**Waiver.**—Where bankrupt, though duly served in action on claim barred by his discharge defaulted, court of bankruptcy cannot enjoin enforcement of judgment of New York state court, for, unless pleaded, defense of discharge is waived; hence bankrupt, if entitled to any relief, must resort to method prescribed by Code Civ. Proc. N. Y. § 1268, now Debtor and Creditor Law, § 150.—In re Boardway, U. S. D. C., 248 Fed. 364.

15.—**Brokers—Warranty.**—Where an officer undertook on behalf of a corporation to employ a broker on commission, and, in an action for commission, testimony, to which the officer failed to object, showed that he had no authority to employ plaintiff, plaintiff could recover from the officer for breach of warranty of authority.—Hallheimer v. Rice, N. Y., 169 N. Y. S. 1002.

16. **Carriers of Goods—Bill of Lading.**—Carrier issuing bills of lading on goods received by compress company with which it had contract for preparing cotton for shipment provided that compress company should reimburse carrier for storing and handling, and the carrier is liable for loss caused by negligence of compress company.—Chas. W. Sheppard Cotton Co. v. New Orleans, M. & C. R. Co., Miss., 78 So. 193.

17.—**Delivery.**—Where general delivery man sent boy with load of ice to another's place of business, and such other, without deliveryman's knowledge, instructed driver to deliver ice cream, the law would not imply driver's authority to contract for deliveryman that ice cream would be delivered within specified time.—Reynolds v. Hathaway, Neb., 167 N. W. 63.

18.—**Shipment.**—If shipper must do some act as necessary precedent to shipment, delivery to railroad would not be delivery to it as common carrier, but, if shipper is to do nothing further, delivery is to railroad as common carrier.—Hill Mfg. Co. v. New Orleans, M. & C. R. R. Co., Miss., 78 So. 187.

19.—**28-Hour Law.**—A railroad carrier held entitled to recover from a shipper for 250 pounds of hay fed to each carload of a shipment of cattle during the rest period required by Twenty-Eight Hour Law, §§ 2, 3, although some hay was placed in the cars by the shipper.—Pennsylvania R. Co. v. Swift & Co., U. S. D. C., 248 Fed. 315.

20.—**Carriers of Passengers—Breach of Contract.**—That steamship company's agent, in presence of third persons, notified passenger that check was worthless, and demanded payment under threat of expulsion, held a breach of contract and tort.—Austro-American S. S. Co. v. Thomas, U. S. C. C. A., 248 Fed. 231.

21.—**Safe Place to Alight.**—Where street car stopped 15 or 20 feet beyond its usual stopping place at place where step of car was 15½ or 16 inches above roadway, so that passenger might safely alight by extending foot 7 inches out and stepping down while holding onto handlebar, such place was reasonably safe.—Clogher v. New Orleans Ry. & Light Co., La., 78 So. 247.

22. **Chattel Mortgages—Bailment.**—Contract to hold piano for sale, title to remain in music

company, money to be immediately paid over, piano to be returned upon request, was bailment, with right to sell, and not mortgage required by Rev. St. 1911, art. 5654, to be registered.—Renfroe v. Hall, Tex., 202 S. W. 218.

23.—**Lien.**—Although mortgage on meat market outfit was not recorded, it was a valid lien upon the property, where it appeared that purchaser had actual notice thereof at time of sale.—McLendon v. Ricks, Ga., 95 S. E. 471.

24.—**Promissory Note.**—While note and chattel mortgage should be construed together, yet as provisions of note govern in case of conflict, holder may, where there had been long-continued default in payment of interest, exercise option given in note and declare whole of principal and interest due, regardless of provisions of mortgage as to defaults.—Lumbermen's Trust Co. v. Title Ins. & Inv. Co. of Tacoma, U. S. C. C. A., 248 Fed. 212.

25. **Commerce—Employe.**—Employe of railroad engaged in both interstate and intrastate commerce, injured while repairing electric motor, does not fall within federal Employers' Liability Act; it not clearly appearing that motor was appliance used in connection with interstate commerce.—O'Dell v. Southern Ry. Co., U. S. D. C., 248 Fed. 345.

26.—**Employes.**—Where a railroad employe was injured while in a caboose entering defendant's freight yard after it had been detached from an interstate train, recovery might be had under the federal Employers' Liability Act, since the interstate transportation had not ended.—O'Neill v. Erie R. Co., N. Y., 169 N. Y. S. 1008.

27.—**Employes.**—The operator of a hoist used to load rails on flat cars, after workmen had removed them from the ties and laid new rails, was engaged in repair of tracks, and, where the road operated in two states, was engaged in interstate commerce.—Hargrove v. Gulf, C. & S. F. Ry., Tex., 202 S. W. 188.

28.—**Speed Ordinance.**—In an action based on federal Employers' Liability Act for wrongful death through being struck by railroad train, a city ordinance prohibiting the running of a railroad train at a speed greater than 10 miles per hour was admissible, not being superseded by the federal law.—Pennsylvania Co. v. Stalker, Ind., 118 N. E. 163.

29. **Conspiracy—Evidence.**—Where post office inspectors to ascertain whether law was being violated sent defendants decoy letters and received replies purporting to come from office of one of defendants, it is legitimate inference that defendants authorized replies, and they are admissible in prosecution for conspiring to use mails in connection with scheme to defraud.—Holsman v. United States, U. S. C. C. A., 248 Fed. 193.

30. **Constitutional Law—Conscription Act.**—Nondeclarant alien, although by terms of Conscription Act exempt from service, is not denied due process of law because required to present and secure his exemption through exemption boards provided for.—Ex parte Blazekovic, U. S. D. C., 248 Fed. 327.

31. **Conscription Act—Selective Service Act.**—§ 13, as to disorderly houses, does not delegate legislative power to Secretary of War, but empowers him to ascertain and declare the zone within which the statute shall take effect.—United States v. Scott, U. S. D. C., 248 Fed. 361.

32.—**Judicial Power.**—Code, § 580, as amended by 101 Ohio Laws, p. 173, authorizing clerk of common pleas to enter up findings of Public Utilities Commission as a judgment, does not confer judicial power on him, and hence does not violate Const. art. 4, § 1, vesting judicial power in the courts.—Hocking Valley Ry. Co. v. Cluster Coal & Feed Co., Ohio, 119 N. E. 207.

33. **Contracts—Acceptance.**—Where contract provided no payment should be construed to be acceptance of defective work or materials, owner is not estopped from contending against contractor, the building not having been completed in accordance with specifications, that he is entitled to damages, notwithstanding architect's certificate of final payment, with which he has complied.—Dondis v. Borden, Mass., 119 N. E. 184.

34.—**Indemnity.**—Purchaser's deposit with plaintiff bank to be returned if title could not be made held for general, so that contract to indemnify bank for any loss on account of transfer of such deposit to general checking account of vendor did not induce breach of trust rendering indemnity contract void as against public policy; there being no fraud or collusion.—*Citizens' State Bank of Mobridge v. Rosenberger*, S. D., 167 N. W. 154.

35. **Corporations—Directors.**—Corporate directors are personally liable for damages sustained by reason of insolvency of corporation, when a person is induced to extend credit by false representations, either knowingly made, or which in exercise of ordinary care the directors should have known were false.—*Durham v. Wichita Mill & Elevator Co.*, Tex., 202 S. W. 138.

36.—**Guaranty.**—Obvious purpose of Const. Wash. art. 12, § 6, being to protect creditors of corporation and prevent issuance of worthless securities, it does not preclude corporation, which, through agency of another, it organized for purpose of acquiring business of competitor, from guaranteeing principal and interest of indebtedness incurred by its subsidiary.—*Lumbermen's Trust Co. v. Title Ins. & Inv. Co. of Tacoma*, U. S. C. C. A., 248 Fed. 212.

37.—**Net Profits.**—The term "net profits," as applied to a corporation, means that which goes to make up its surplus. It denotes what remains after defraying every expense, including loans falling due as well as interest on such loans. Profits are the surplus earnings available for the payment of dividends.—*Cochrane v. Interstate Packing Co.*, Minn., 167 N. W. 111.

38.—**Stockholders.**—Question whether requisite number of qualified stockholders were present and affirmatively voted for resolution is one of fact, and, where resolution was adopted by requisite number, it is not subject to attack on ground that it was not passed at legally constituted meeting of stockholders, because inspectors of election failed to examine books to determine whether persons voting were registered stockholders.—*General Inv. Co. v. Bethlehem Steel Corp.*, U. S. D. C., 248, Fed. 303.

39. **Covenants—Building Restrictions.**—Restrictive covenants as to erecting only private dwelling, with a 15-foot set back, etc., held breached by erection on two lots of three houses, not facing street, but a court on the southern side of the lots.—*McKenna v. Levy*, N. Y., 169 N. Y. S. 1009.

40.—**Grantee and Successors.**—One of original grantees of lots by deed subjecting them to restrictions was charged with obligation to convey subject to restrictions.—*MacIary v. Morgan*, Mass., 119 N. E. 189.

41.—**Negative.**—Covenant prohibiting erection of building for carrying on trade or business is breached by erection of building with conceded purpose of running a regular boarding house.—*Mischlich v. Lubin*, N. Y., 169 N. Y. S. 906.

42. **Damages—Evidence.**—In action by owner of plantation for damages for acts of violence, driving away a tenant planting on shares, evidence held not to sustain claim for damages suffered by plaintiff through illness of wife.—*Sandlin v. Coyle*, La., 78 So. 261.

43.—**Public Policy.**—Public policy does not demand that verdict in railroad servant's action for injuries should not be as large as \$20,000 on any grounds, though federal Employers' Liability Act is virtually compensation statute, and fixes liability for defective appliances, regardless of negligence.—*Galveston, H. & S. A. Ry. Co. v. Hopkins*, Tex., 202 S. W. 222.

44. **Dead Bodies—Autopsy by Officer.**—It is no defense to action for damages from autopsy on body of plaintiff's daughter without consent of next kin that defendant, the attending physician, performed the autopsy to ascertain cause of death, so as to be able to certify it, as required by Gen. St. 1913, § 4652.—*Woods v. Graham*, Minn., 167 N. W. 113.

45. **Deeds—Maps and Plans.**—Where deed recited that granted premises were shown on plan annexed and to be recorded therewith, plan became incorporated in deed.—*MacIary v. Morgan*, Mass., 119 N. E. 189.

46. **Election of Remedies—Evidence.**—See Master and Servant. Where corporation bought cotton oil subject to rules of association which required notice of date when to ship to be given by the purchaser, and on failure to deliver authorized purchase through broker of like quantities, and trustee in bankruptcy of purchaser authorized broker to buy like quantities but broker failed to do so, employment of the broker was not an election of remedies.—*Planters' Oil Co. v. Gresham*, Tex., 202 S. W. 145.

47. **Electricity—Trespasser.**—Where a boy playing upon a building belonging to another party by owner's sufferance climbed upon a tree either on such party's premises or in an alley, and while there was injured by defendant's uninsulated wires, such boy was not a trespasser as to defendant.—*William v. Springfield Gas & Electric Co.*, Mo., 202 S. W. 1.

48. **Eminent Domain—Right of Way.**—Purchase by railroad from landowner of an additional right of way for double-tracking purposes did not settle future damages from increased drainage onto land, made necessary by changes of grade, where at time of transaction landowner did not know and could not reasonably have expected that such change of grade was contemplated.—*Chicago & E. R. Co. v. Hoffmann*, Ind., 119 N. E. 169.

49. **Frauds, Statute of—Joint Adventure.**—Where suit was brought for contribution by one joint adventurer against another, that the one sued did not indorse a note with the others in furtherance of their enterprise, from which note the loss occurred, does not bring his obligation within the statute of frauds as a promise to answer for the debt of another.—*Gates v. Fauvre*, Ind., 119 N. E. 155.

50. **Garnishment—Judgment.**—Judgment against garnishee is as to him conclusive as to plaintiff's valid judgment against main debtor whose effects were sought to be reached in garnishment, even where attachment issued against nonresident was executed by summons of garnishment and garnishee did not answer.—*Wm. R. Warner & Co. v. Burkhalter*, Ga., 95 S. E. 470.

51. **Habeas Corpus—Conscription Act.**—Where petitioner, who was certified into service under Conscription Act, was not, having failed to comply with rules and regulations as to claim for exemption, absolutely entitled to relief on account of his alienage, issuance of habeas corpus to secure release rests in sound discretion of trial court.—*Ex parte Blazekovic*, U. S. D. C., 248 Fed. 327.

52.—**Custody of Child.**—An order denying a father's petition in habeas corpus for possession of his daughter and awarding her to maternal grandparents, held proper for child's best interests where grandparents had furnished her a good home for several years, and the facts concerning petitioner give no assurance of his furnishing the child proper home surroundings.—*Atkinson v. Downing*, N. C., 95 S. E. 487.

53. **Highways—Change of road.**—Where large volume of water flowed through natural swale over plaintiff's land, and she constructed embankment and ditch, diverting water to public highway, and the road was regraded and a small culvert insufficient to carry the water was put in, plaintiff could not compel the highway officials to change the road so as to dispose of the artificial waters collected by her and cast upon the highway.—*Brightman v. Hetzel*, Iowa, 167 N. W. 86.

54.—**Collision.**—Where defendant, when six rods away discovered that driver of plaintiff's car was unable to get out of road on account of a rut, but made no attempt to avoid collision, although he had his car under full control and there was nothing to prevent him from turning to right, he cannot recover on his counterclaim.—*Dircks v. Tonne*, Iowa, 167 N. W. 103.

55. **Homestead—Exemption.**—In suit in chancery between tenants in common for sale of land for division, where plaintiff failed for want of title, and register issued execution for costs against him, against which plaintiff interposed claim of homestead exemption, plaintiff's homestead was exempt.—*Morschheimer v. Wood*, Ala., 78 So. 200.

56. Husband and Wife—Community Property.—Where a trunk containing baggage of the husband and wife most of which was community property, and part of which belonged to the wife, was lost by the innkeeper, both husband and wife could sue to recover the damage in the same suit.—*Zeiger v. Woodson*, Tex., 202 S. W. 164.

57.—Head of Family.—Where a husband and wife reside together, the legal presumption always is that the house and all household effects belong to the husband as the head of the family, which presumption is rebuttable.—*Young v. State*, Ga., 95 S. E. 478.

58. Infants—Contracts.—In action by infant to recover payments made upon piano after avoiding contract, plaintiff's right to recover is not precluded because an adult was her joint obligor, under contract, where all payments were made by or for plaintiff.—*Story & Clark Piano Co. v. Davy*, Ind., 119 N. E. 177.

59. Insurance—Accident.—Complaint, alleging that plaintiff, while asleep, by some means unknown to him, suffered complete loss of his testicles bag, and showed "accidental" injury within policy insuring against bodily injuries affected directly and independently by accidental means.—*Harrison v. Interstate Business Men's Accident Ass'n of Des Moines*, Iowa, Ark., 202 S. W. 34.

60.—Application.—Where agent writes answers to questions in an application for accident insurance, not made a part of the policy, the insured is not bound by incorrect answers, where he does not know that they have been so written.—*American Life & Accident Ins. Co. v. Walton*, Ark., 202 S. W. 20.

61.—Beneficiary.—Naming an illegitimate as son and beneficiary in a fraternal benefit certificate being a sufficient recognition under Code, § 3385, the child is a proper beneficiary under section 1824, providing that an "heir" may be a beneficiary.—*Booz v. Booz*, Iowa, 167 N. W. 93.

62.—Custom.—Custom of fraternal order as to payment of death benefits contrary to contract between itself and member, embodied in by-law, would be no defense to subsequent claim by another admitted beneficiary.—*Williams v. Working Benevolent State Grand Lodge of South Carolina*, S. C., 95 S. E. 517.

63.—Direct Loss.—The word "direct" in a fire policy that insurer should be liable only for "direct loss by fire," means merely "immediate" or "proximate" as distinguished from "remote," and means no more than the word "proximate" in the law of negligence.—*Western Assur. Co. v. Hann*, Ala., 78 So. 232.

64.—Notice of Accident.—That partnership holding liability policy had reasonable doubt as to existence of any injury or liability to one scalded by jet of steam from their engine could not be used to deprive insurer of contractual right under policy to have immediate notice of accident, regardless of damages that might be claimed to flow from it.—*McCarthy v. Rendle*, Mass., 119 N. E. 188.

65.—Public Policy.—Public policy held not to prevent recovery by beneficiaries on a policy of insurance, where the death of the insured was caused by a criminal operation, the policy not expressly exempting liability for such cause.—*Mutual Life Ins. Co. of New York v. Guller*, Ind., 119 N. E. 173.

66.—Suicide.—A clause in a life insurance policy avoiding it if assured shall die "by his own act," contemplates suicide only, and does not include death of a woman from septicemia, caused by an operation to produce miscarriage.—*Mutual Life Ins. Co. of New York v. Guller*, Ind., 119 N. E. 173.

67.—Waiver.—Where, after damage to goods and removal to other location within knowledge of insurer, a duplicate receipt in sum of loss, providing "said policy is hereby reduced in said sum," and unearned premium was not returned, the insurer waived the right to avoid policy for removal of goods.—*Camden Fire Ins. Ass'n v. Bond*, Tex., 202 S. W. 220.

68. Intoxicating Liquors—Transportation.—Defendant, who hired an automobile and driver and went to a wet county for liquor marked

with name of another than defendant as consignee, and brought the same into a dry county, held guilty of violating the Prohibition Law as to transportation in dry territory of liquor falsely labeled. (Affirmed by divided court.)—*People v. Spaulding*, Mich., 167 N. W. 27.

69. Joint Adventures—Contribution.—Where one of several joint adventurers did not join in a renewable note, which was not negotiable, the debt was not paid by such note, and payment of the renewal note by another member constituted the first payment and entitled him to contribution.—*Gates v. Fauvre*, Ind., 119 N. E. 155.

70. Landlord and Tenant—Damages.—Where landlord knew that floor of porch was rotten, and failed to keep his promise to repair it, tenant, injured by falling through floor, could recover damages ex contractu, as being within contemplation of parties.—*Hart v. Coleman*, Ala., 78 So. 201.

71.—Termination of Tenancy.—Where there was no unconditional notice to vacate given tenant from year to year, but notice merely proposed different kind of rent, renting for part of crops, instead of fixed money rent, to which tenant replied he would do what was right, there was not sufficient notice to terminate tenancy.—*Kellam v. Belote*, Va., 95 S. E. 453.

72. Larceny—Asportation.—Carrying meat from the owner's refrigerator to the front door and placing it near a hole in the screen, with intent to steal and carry it away, constituted an asportation.—*Banks v. State*, Ark., 202 S. W. 43.

73. Master and Servant—Assumption of Risk.—In actions in state court based on federal Employers' Liability Act, procedure is governed by law of state, and, while what constitutes assumption of risk is substantive law, the method of determining whether in a given case employee has assumed the risk is a question of procedure.—*Pennsylvania Co. v. Stalker*, Ind., 119 N. E. 163.

74.—Casual Employee.—Under Employers' Liability Act, pt. 4, § 1, excepting casual employees from definition of employees, and part 2, § 6, excepting the employees of independent contractors on a contract "merely auxiliary and incident to" the business, machinist sent by machine shop to do certain work on a machine was not employee of company owning machine.—*Texas Refining Co. v. Alexander*, Tex., 202 S. W. 131.

75.—Course of Employment.—Where a servant, employed to check and collect for shortages of master's employees delivering ice, was shot and killed by one of such employees as a result of a quarrel over such collection, such servant's death arose out of employment.—*Polar Ice & Fuel Co. v. Mulray*, Ind., 119 N. E. 149.

76.—Employers' Liability Act.—Under New Hampshire Employers' Liability Act, applicable to employees in mill, carpenter, whose employment at times required him to engage in manual labor in connection with or in proximity to machinery, is within scope of statute, though his injuries resulted from fall from platform outside of mill building.—*Pellerin v. International Cotton Mills*, U. S. C. C. A., 248 Fed. 242.

77.—Fortuitous Death.—Where employee died from mitral regurgitation while working in a room at a temperature of 75 to 78 degrees, which room was ventilated by two portholes and two large doors, the temperature was not unusual or fortuitous.—*Guthrie v. Detroit Shipbuilding Co.*, Mich., 167 N. W. 37.

78.—Respondeat Superior.—A corporation operating a hotel is not liable to its scrub-woman injured by a fall on a stairway, where, for aught that appears, the object on which the woman slipped might have been dropped there only a moment before by some one for whose conduct the corporation was not responsible.—*Zugbie v. J. R. Whipple Co.*, Mass., 119 N. E. 191.

79.—Workmen's Compensation Act.—Where employee of manufacturing corporation, engaged to drive motor truck and make deliveries, suffered accident in transporting law books as a favor to stockholder, it appearing that his superior directed him to deliver the books in such way as not to interfere with his regular

work, such employee was not injured in course of his employment, so as to be entitled to award under Workmen's Compensation Act.—Carnahan v. Mailometer Co., Mich., 167 N. W. 9.

80.—Workmen's Compensation Act.—An injury received by a workman while engaged in his usual work without intervention of something unusual or fortuitous is not an "accident"—Guthrie v. Detroit Shipbuilding Co., Mich., 167 N. W. 37.

81. Mines and Minerals—Forfeiture.—Where a mining lease gave lessee the right to remove his machinery at the termination of the lease, it was left after cancellation of the lease, on the premises for six months and was extensively repaired, the lessee and creditors forfeited their interest therein.—Heim v. Brock, Ark., 202 S. W. 36.

82. Monopolies—Abstract Business.—As records are open to inspection of all, abstract business is not susceptible of being monopolized in same sense that dealing in commercial product may be monopolized, so transaction whereby one of several competing abstract companies acquired business of its competitors is not subject to attack.—Lumbermen's Trust Co. v. Title Ins. & Inv. Co. of Tacoma, U. S. C. C. A., 248 Fed. 212.

83. Municipal Corporation—Constitutional Law.—Ordinance of city of Birmingham, requiring buildings more than two stories high, in part or in whole used for certain purposes, to be provided with standard fire escapes, etc., was not unconstitutional as uncertain in terms.—Birmingham Ry., Light & Power Co. v. Millbrat, Ala., 78 So. 224.

84.—Contract.—Where contractor on a public building executed a bond for performance and on his telegraphic request, after advice of the city attorney, the surety by wire consented to insert the words, "and pay for all materials and labor," as required by Acts 1899, c. 182, such addition became a part of the bond.—City of Bristol v. Bostwick, Tenn., 202 S. W. 61.

85.—Negligence per se.—Where defendant's automobile struck a wagon, causing a horse to run away, and it ran down one side of the street and abruptly turned to the other, going counter to traffic, and struck plaintiff's decedent, riding a bicycle, decedent was not guilty of negligence as a matter of law for failure to see the horse.—Dier v. Voorhees, Mich., 167 N. W. 26.

86.—Workmen's Compensation Act.—Where employee engaged in removing old and placing new brickwork around one of the boilers in a plant died as result of heat prostration, it not appearing that he exercised himself in any unusual manner or to an unusual degree different from other employees, his death cannot be deemed accidental within Workmen's Compensation Act so as to warrant award.—Roach v. Kelsey Wheel Co., Mich., 167 N. W. 33.

87. Negligence—Gratuitous Service.—Where seller of porch swing undertook to hang same for buyer, and did so negligently, so that support gave way and buyer was injured, seller was liable to buyer, though hanging of swing was purely gratuitous.—Rick Furniture Co. v. Smith, Tex., 202 S. W. 99.

88. Pledges—Bona Fide Purchaser.—Where party sold piano and received purchase price, and thereafter pledged another piano, which he did not own, to secure delivery, and pledgee subsequently received notice of ownership of pledged piano, and later entered into agreement with seller to accept pledged piano in place of one he bought, the pledgee was not a purchaser without notice.—Renfroe v. Hall, Tex., 202 S. W. 218.

89. Principal and Agent—Evidence.—That mortgagor made check covering loan payable directly to mortgagor, not to her attorney who effected loan, and that mortgagor agreed to pay attorney for his services, held not conclusive as against countervailing evidence of agency of attorney for mortgagor instead of mortgagor.—Thompson v. Atchley, Ala., 78 So. 196.

90. Principal and Surety—Extension of Time.—Contract for extension of time for payment of a note for a definite period, when the debt bears interest, is on a valuable considera-

tion, and binding on the parties; thus discharging the surety not consenting thereto.—Scarborough v. McKinnon, Tex., 202 S. W. 223.

91. Public Lands—Mortgage.—Mortgage by one who had not perfected his homestead rights, having no patent, certificate, or final receipt, and not having furnished sufficient proof to acquire a certificate, was absolutely void under Rev. St. U. S. §§ 2290, 2291 (U. S. Comp. St. 1916, §§ 4531, 4532).—Hale v. McGraw, Ala., 78 So. 214.

92. Release—Avoidance of.—A release of damages for personal injury may be avoided on ground of mutual mistake, if existence of substantial injury was not known and considered when release was executed, unless release expressly applied to unknown as well as known injury.—Althoff v. Torrison, Minn., 167 N. W. 119.

93. Specific Performance—Enforceability.—Agreement, covering employment of manager by oil company, whereby manager purchased 30 shares of stock, giving his note, to be paid from dividends, held not unilateral and binding only on oil company, so that transfer of stock was not specifically enforceable by manager.—Mutual Oil Co. v. Hills, U. S. C. C. A., 248 Fed. 257.

94.—Sale of Chattels.—Generally, contracts for sale of chattels will not be specifically performed, because their money value as damages will enable purchase of others of like kind, but it is otherwise, where the chattels have a special value to the owner.—Southern Iron & Equipment Co. v. Vaughan, Ala., 78 So. 212.

95. Street Railroads—Contributory Negligence.—Where woman of intelligence and activity, aware of dangers of situation and with nothing to distract her attention, or hinder her prevision, walked upon street railway track not at regular crossing, without taking adequate precautions for her safety, there can be no recovery as matter of law.—Virginia Ry. & Power Co. v. Boltz, Va., 95 S. E. 467.

96. Subrogation—Mistake of Fact.—Where life tenant, through mistake of fact, borrowed money to discharge mortgage, and plaintiff loaned money believing that life tenant owned fee, plaintiff was entitled to subrogation to rights of original mortgagor, on ground of mistake of fact.—Detroit & Northern Michigan Building & Loan Ass'n v. Oram, Mich., 167 N. W. 50.

97. Waters and Water Courses—Reasonable Detention.—The owner of an upper dam may withhold the waters of a stream at certain periods to create sufficient storage to efficiently carry out his purpose as riparian owner, but such right is restricted to a reasonable detention, measured by the capacity and uses of stream by himself and other riparian owners.—State v. Apfelbacher, Wis., 167 N. W. 244.

98. Wills—Devises.—A will providing that, after death of three sons, property devised in trust for their lives should be divided "equally" among the "heirs at law" of the three sons "according to laws of distribution," gave the property in equal shares to the wives of three sons who died without issue and a living child of a fourth son who died before execution of the will.—Morse v. Ward, Conn., 103 Atl. 119.

99.—Life Estate.—Will devising life estate of widow, and providing that, "if my wife should marry, I give to our sons" certain stock, and "the rest of my property, real and personal, be divided according to law," gave to the widow, in the event of her marriage, one-half the personality, except the stock, and a life estate in one-third of the realty, with remainder to his children.—Weidemann v. Weideman, Ky., 201 S. W. 467.

100. Wills—Words of Limitation.—In view of Civ. Code 1912, § 3571, making works of limitation unnecessary to convey fee by devise, a will devising land in trust for a daughter and her children as her portion, with limitation over in case of death of her and her husband without children surviving who should attain 21 or be married, held to give daughter an absolute estate, so as to vest by inheritance the fee on her surviving child attaining 21 years.—Williams v. Gadsden, S. C., 95 S. E. 519.

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